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No.

IN THE

Supreme Court of the United States

October Term, 1994

BOARD OF EDUCATION OF THE CITY OF CHICAGO,

Petitioner,

v.

AFFILIATED FM INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Of Counsel:

Thomas R. Meites
MEITES, FRACKMAN, MULDER & BURGER
135 South LaSalle Street
Suite 1425
Chicago, Illinois 60603
(312) 263-0272

Michael J. Hernandez
CHICAGO BOARD OF EDUCATION
1819 West Pershing Road
Chicago, Illinois 60609
(312) 535-3785

Bruce J. Ennis, Jr.
Counsel of Record

Barry Levenstam
Paul M. Smith
Stephen L. Wood
JENNER & BLOCK
601 Thirteenth Street, N.W.
Suite 1200 South
Washington, D.C. 20005
(202) 639-6000
Counsel for Petitioner

QUESTION PRESENTED

Whether the Seventh Circuit's policy of refusing to anticipate a future development in state law, even in a situation where it is very likely that a state's highest court would adopt such a new rule, is consistent with the fundamental goals underlying the *Erie* doctrine -- *i.e.*, discouragement of forum-shopping and avoidance of inequitable administration of the law.

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IN THE SUPREME COURT OF THE UNITED STATES

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BOARD OF EDUCATION OF THE
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AFFILIATED FM INSURANCE COMPANY,
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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner the Chicago Board of Education respectfully requests that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit in this case.[1]

OPINIONS BELOW

The district court's June 2, 1993, Memorandum Opinion and Order (Pet. App. 9a-15a) rejected the magistrate judge's Report and Recommendation dated October 5, 1992 (Pet. App. 16a to 68a), and

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[1] The parties listed in the caption were the only parties in the courts below.

granted plaintiff-respondent's motion for summary judgment. Neither the magistrate judge's report nor the district court's decision is reported. The May 12, 1994, opinion of the United States Court of Appeals for the Seventh Circuit affirming the district court's judgment is reported at 23 F.3d 1261 (7th Cir. 1994), and reprinted at pages 1a to 6a of the Appendix to this Petition.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued its decision on May 12, 1994. A timely petition for rehearing was denied on June 7, 1994 (Pet. App. 69a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1652. State laws as rules of decision.

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT

The Chicago Board of Education ("the Board") is responsible for the operation of the Chicago public school system, one of the Nation's largest. Beginning in 1972, the Board purchased a series of insurance policies from respondent Affiliated FM Insurance Company ("AFM") covering catastrophic property damage. For the period 1978 through 1990, these policies covered "all risks" to the Board's property. Because these policies included a deductible of $1 million, the Board never filed a claim with AFM until 1990, when it filed the claim at issue in this litigation.

That claim arose when the Board was required by state law to undertake an asbestos abatement program in its facilities, and determined that this program would cost hundreds of millions of

dollars. In order to recoup this cost, the Board first pursued litigation against various asbestos manufacturers. In that litigation, the state trial court ruled that the Board's tort claims were barred by the applicable statute of limitations, but the Illinois Supreme Court ultimately disagreed, ruling that the Board, as a governmental entity, enjoyed immunity from the application of statutes of limitations under the doctrine of *nullum tempus*. *Board of Educ. v. A, C & S, Inc.*, 546 N.E.2d 580 (Ill. 1989) ("*A,C&S*").[2] That same year, the Illinois First District Appellate Court (which hears cases arising in Chicago), relying in part on the *A,C&S* decision, ruled that one of the manufacturers sued by the Board was entitled to insurance coverage under that manufacturer's comprehensive general liability policy. *United States Fidelity & Guar. Co. v. Wilkin Insulation Co.*, 550 N.E.2d 1032, 1036 (Ill. App. Ct. 1989), *aff'd*, 578 N.E.2d 926 (Ill. 1991).

Soon after these rulings in *A,C&S* and *Wilkin*, the Board also filed a claim with respondent, its own property insurer. AFM eventually denied the claim and, that same day, filed a declaratory judgment action in federal court, based on diversity jurisdiction, alleging that it was not liable under Illinois law to indemnify the Board for its loss.

In the district court, AFM moved for summary judgment, arguing, *inter alia*, that the Board had not instituted suit against it within twelve months of the loss and therefore had violated the insurance contract.[3] The motion was presented to a magistrate

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[2] "*Nullum tempus*" is shorthand for the latin phrase "*quod nullum tempus occurrit regi*," which means "time does not run against the sovereign." *See Guaranty Trust Co. v. United States*, 304 U.S. 126, 132 (1938). The doctrine immunizes governmental bodies from forfeiture of claims based on statutes of limitations.

[3] The Illinois Insurance Code requires all fire and lightning insurance policies to contain "sue within 12 months" provisions. *See Stofer v. Motor Vehicle Casualty Co.*, 369 N.E.2d 875, 876 (Ill. 1977) (quoting provision from Standard

(continued...)

judge, who recommended rejecting AFM's limitations argument, stating that the Board was entitled to immunity from the running of the limitation period contained in the parties' contract. The magistrate judge acknowledged that "ordinarily the terms of the contract determine the rights of the parties," Pet. App. 56a, but, relying on the Illinois Supreme Court's rationale in *A,C&S*, concluded that the public policy concerns involved -- the very same policy concerns in *A,C&S*, *i.e.*, "the resulting health concerns involved and the interest in the safety of the public buildings and a large segment of this State's population which attends the public schools and for the children who will in the future attend these schools" -- are "paramount to procedural concerns." *Id.*[4]

On review, the district court rejected the magistrate judge's analysis of relevant Illinois Supreme Court doctrines. Pet. App. 12a. The district court agreed with AFM's argument that it should distinguish *A,C&S* and instead apply the Illinois Second District Appellate Court case of *Village of Lake in the Hills v. Illinois Emcasco Insurance Co.*, 506 N.E.2d 681 (Ill. App. Ct.),

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[3] (...continued)
Policy that is required by state law and administrative code). While "all risks" policies are only required to have this provision cover fire and lightning claims, the policy at issue applied this provision to all claims.

[4] The magistrate judge recognized that the Illinois Supreme Court had not ruled on the precise legal issue and that he was therefore required under the *Erie* doctrine, *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), to predict how the Illinois Supreme Court would rule if the issue were before it. *See* Pet. App. 55a (citing *Roberts v. Western-So. Life Ins. Co.*, 568 F. Supp. 536,539 (N.D. Ill. 1983); *Kelly v. Stratton*, 552 F. Supp. 641, 643 (N.D. Ill. 1982)). The magistrate judge rejected AFM's argument that the Illinois Second District Appellate Court's decision in *Village of Lake in the Hills v. Illinois Emcasco Ins. Co.*, 506 N.E.2d 681 (Ill. App. Ct.), *appeal denied*, 515 N.E.2d 128 (Ill. 1987), applied, finding instead that the Illinois Supreme Court would apply the *nullum tempus* doctrine as it had in *A,C&S* and analogous cases. Pet. App. 56a.

appeal denied, 515 N.E.2d 128 (Ill. 1987) (decided two years before *A,C&S*), to the Board's claims against AFM. Pet. App. 13a. Under *Lake in the Hills*, the district court held, the Board was bound by AFM's one-year contractual limitation period, and the Board failed to file suit within the appropriate time frame. The district court thus concluded that the Board's claims against AFM were barred as untimely. *Id.*

The court of appeals affirmed. It agreed, first of all, that *A,C&S* did not provide the rule of decision. *Id.* at 4a-5a. It noted that *A,C&S* involved a *statute* of limitation, not a contractual agreement that operated to limit claims against the insurer, and cited *Lake in the Hills* for the proposition that *nullum tempus* immunity does not apply to filing deadlines in contracts. *Id.* The court of appeals failed to discuss any of the factors that were considered determinative by the Illinois Supreme Court in *A,C&S* when that court held that public policy required governmental immunity from statutory filing deadlines. The court of appeals also failed to give any reason why it believed that the Illinois Supreme Court would conclude that the same public policy reasons that justified vitiating time deadlines imposed by the state legislature would not also justify vitiating time deadlines in a private contract. And the court also overlooked Illinois Supreme Court precedent holding that contractual deadlines must give way to public policy in other situations.

Furthermore, because the court of appeals believed that *Lake in the Hills*, a single intermediate appellate court case, had "settled" Illinois law on the issue, it refused to certify the question to the Illinois Supreme Court. *Id.*[5]

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[5] The Board requested the court of appeals to certify the following question to the Illinois Supreme Court (Pet. App. 5a):

> Whether appellant Chicago Board of Education as a public entity enforcing public rights is immune under the doctrine of *nullum*

(continued...)

REASONS FOR GRANTING THE WRIT

This Court should review the decision below to resolve a widening split among the circuits on the fundamental question of how a federal court exercising diversity jurisdiction should ascertain and apply the governing state law. In recent years, the Seventh Circuit has become the leading exponent of the view that federal courts called upon to apply state law should be reluctant to "predict" how the state's highest court would rule on a question that has not previously been presented to it. Under this view, federal courts should remain unreceptive to "untested legal theories brought under the rubric of state law," *Affiliated FM Ins. Co. v. Trane Co.*, 831 F.2d 153, 155 (7th Cir. 1987), and, where possible, should follow the law as set forth in decisions of inferior state courts. *Id.*

This view of the manner in which a federal court should ascertain state law is at odds with the approach traditionally followed by other circuits, which emphasizes the long-standing notion that a federal court sitting in diversity should endeavor to predict the law that would be applied by the state's highest court. *See, e.g., Torres v. Goodyear Tire & Rubber Co.*, 867 F.2d 1234, 1238 n.1 (9th Cir. 1989) (noting the Seventh Circuit's quite different approach and stating that "this circuit has not seen fit to assume such a posture of restraint when it comes to deciding novel questions of state law"). That traditional view is a direct reflection of the "twin aims of the *Erie* doctrine," which are "'discouragement of forum-shopping and avoidance of inequitable administration of the laws.'" *Salve Regina College v. Russell*, 499 U.S. 225, 234 (1991) (quoting *Hanna v. Plumer*, 380 U.S. 460, 468 (1965)). By contrast, the Seventh Circuit's "strong policy against expanding state law by predicting the trends in state court decisions,"

5/ (...continued)

tempus from suit limitations provisions in its property insurance policies when seeking to recover for asbestos-related property damage.

19 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4507, at 25 (Supp. 1994), has the effect of "directly encourag[ing] forum-shopping, not only between state and federal court, but also between federal courts in the Seventh and other Circuits." *Id.* at 26.

This case provides a clear illustration of this problem. It is difficult to look at the relevant state court decisions without predicting that, if this case had been in state court, petitioner would have had an excellent chance of overcoming respondent's timeliness defense, at least by the time the case reached the Illinois Supreme Court. *See* pp. 14-18 *infra*. Respondent, however, made a deliberate choice to file a declaratory judgment action first in federal court, cognizant that the Illinois Supreme Court had not yet decided the specific issue presented here -- the enforceability against public entities of filing deadlines contained not in state statutes of limitations (as in *A, C&S*) but in insurance policy provisions. The result of this obvious forum-shopping was a decision in which the Seventh Circuit woodenly followed the ruling of an Illinois intermediate appellate court in a case that (1) was decided before the Illinois Supreme Court's recent *A, C&S* decision, and (2) did not itself apply the relevant factors mandated by the Illinois Supreme Court in *A, C&S* and a prior case. What this ultimately means is that in a case of enormous practical importance to the state's largest school system, the state's own policies were not vindicated.

This Court has not addressed the issue of how federal courts should determine state law since its decision 27 years ago in *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967).[9] There is a real need for further guidance, both to bring uniformity to the federal system and to restore adherence to the basic *Erie* principle that parties should not be able to affect the law applicable to a case

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[9] In *Bosch*, this Court indicated that "under some conditions, federal authority may not be bound even by an intermediate state appellate court ruling." 387 U.S. at 465. The Court did not, however, specify exactly when this would be true.

by choosing to go into federal court. This case would be an excellent vehicle for resolving these important issues. Having set forth the controlling principles, this Court could then remand this case to permit the lower courts to apply them in discerning the applicable state law.

I. THERE IS A CLEAR CONFLICT AMONG THE CIRCUITS CONCERNING THE PROPER APPROACH TO DETERMINING THE CONTENT OF STATE LAW.

The Seventh Circuit has developed and applied its approach to determining state law in a series of cases. The most distinctive feature of that approach is a frank recognition, in many (though not all) of the court's decisions, that outcomes will be different in federal court than they would be in state court -- *i.e.*, that federal courts can and should refuse to apply "innovative" state law doctrines even in cases where the highest state court probably would be receptive to those new doctrines. *See, e.g., Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1234 (7th Cir. 1993) ("The plaintiffs are asking us to innovate boldly in the name of the Illinois courts, and such a request is better addressed to those courts than to a federal court."); *Shields Enters., Inc. v. First Chicago Corp.*, 975 F.2d 1290, 1298 (7th Cir. 1992) ("Absent clearer evidence of how the Illinois Supreme Court would decide, we are unwilling to 'speculate on any trends in [Illinois] law,' . . . ") (quoting *Shaw v. Republic Drill Corp.*, 810 F.2d 149, 150 (7th Cir. 1987)); *Anderson v. Marathon Petroleum Co.*, 801 F.2d 936, 942 (7th Cir. 1986) ("[F]ederal court is not the place to press innovative theories of state law.").[2]

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[2] The Seventh Circuit has indicated that its "policy applies with special force to a plaintiff in a diversity case who has chosen to litigate his state law claim in federal court." *Shaw v. Republic Drill Corp.*, 810 F.2d at 150. *See also Anderson v. Marathon Petroleum Co.*, 801 F.2d at 942 (policy "is particularly *apropos* in a case such as this where residents file suit in federal court against a nonresident defendant"). There are also some cases in which the Seventh Circuit

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In order to avoid making predictions about what a state supreme court would say about a novel question, the Seventh Circuit often acts almost as if it were a state *trial* court -- giving controlling significance to any decision on point from a state intermediate appellate court. *See, e.g., Shields Enters., Inc. v. First Chicago Corp.*, 975 F.2d at 1298 (refusing to "speculate" about state law, "especially when an Illinois appellate court has expressly rejected the action [plaintiff] seeks to bring"); *Affiliated FM Ins. Co. v. Trane Co.*, 831 F.2d at 155 (under *Erie*, "a federal court must apply the state law as declared by the highest state court *or otherwise by the intermediate appellate court of the state*") (emphasis added).

There is a clear conflict between this approach and the approach followed in most other circuits.[8] Two examples are the Third and Ninth Circuits, where it is clearly understood that the task of a federal court in a diversity case is to *predict* what the state's *highest* court would say about a novel issue, rather than

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[7] (...continued)
at least states its *willingness* to predict that a highest state court would change or extend current doctrine. *See, e.g., Todd v. Societe BIC, S.A.*, 21 F.3d 1402, 1411-12 (7th Cir. 1994) (en banc). More numerous, however, are the decisions counseling against any innovations in state law regardless of the procedural posture. See the cases cited in the text above, and *Aftam Export Corp. v. Metallurgiki Halyps, S.A.*, 772 F.2d 1358, 1370 (7th Cir. 1985) ("Federal judges are disinclined to make bold departures in areas of law that we have no responsibility for developing."). This case illustrates that policy in action.

[8] In *Torres, supra*, the Ninth Circuit cited decisions from the First and Fifth Circuits, along with several Seventh Circuit cases, as examples of the "limited discretion" approach that it saw as conflicting with the Ninth Circuit's own approach. *Torres v. Goodyear Tire & Rubber Co.*, 867 F.2d at 1238 n.1 (citing *Dayton v. Peck, Stow & Wilcox Co.*, 739 F.2d 690, 694-95 (1st Cir. 1984), and *Rhynes v. Branick Mfg. Corp.*, 629 F.2d 409, 410 (5th Cir. 1980)). *See also Martel v. Stafford*, 992 F.2d 1244, 1247 (1st Cir. 1993) (plaintiffs cannot reasonably expect federal court "to steer state law into unprecedented configurations"); 19 C. Wright, A. Miller & E. Cooper, *supra*, § 4507 at 25 (Supp. 1994) (describing the Seventh Circuit's distinctive posture).

merely locating and following any lower-court decision on point. *See, e.g.*, *General Motors Corp. v. Doupnik*, 1 F.3d 862, 865 & n.4 (9th Cir. 1993) (where the state supreme court "provides no determinative case law on an issue," the federal court must use its "best judgment to ascertain how that Court would decide such issue"; lower-court decisions "may provide guidance as to the direction of the State Supreme Court's probable decisionmaking" but are not binding); *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 378 (3d Cir. 1990) (where the state's highest court has not spoken, the federal court must "predict" what it would do, after giving "proper regard to the relevant rulings of other courts of the state") (internal quotation marks and citations omitted); *McKenna v. Ortho Pharmaceutical Corp.*, 622 F.2d 657, 662-63 (3d Cir.), *cert. denied*, 449 U.S. 976 (1980) (same).

Unlike the Seventh Circuit, these circuits are attentive to the forum-shopping problems that arise if federal courts act differently from state courts -- *i.e.*, if federal courts are unwilling to anticipate new legal doctrines that a state's highest court would be likely to adopt. As the Ninth Circuit has put it, if federal courts limit themselves to applying "clearly established state law" in diversity cases, litigants will face an "inhospitable forum" for any novel claims, and defendants in such cases "could ensure a decision in their favor simply by removing the case to federal court." *Paul v. Watchtower Bible & Tract Soc'y*, 819 F.2d 875, 879 (9th Cir.), *cert. denied*, 484 U.S. 926 (1987). *See also Becker v. Interstate Properties*, 569 F.2d 1203, 1206 (3d Cir. 1977), *cert. denied*, 436 U.S. 906 (1978) (a diversity litigant should not "be penalized for his choice of the federal court by being deprived of the flexibility that a state court could reasonably be expected to show").

Similar concerns have been voiced by commentators. In the words of Wright and Miller, if federal courts lacked the flexibility to disregard lower state court decisions that the highest state court likely would not follow, "the Erie doctrine simply would have substituted one kind of forum-shopping for another."

19 C. Wright, A. Miller & E. Cooper, § 4507, at 90-91. A lawyer with a case dependent on "an ancient or shaky state court decision . . . would have a strong incentive to bring the suit in or remove it to federal court, hoping that the state decision could not be impeached under [a] mechanical application of existing state precedents." *Id.* at 91. *See also id.* at 26 (Supp. 1994) (discussing the Seventh Circuit's recent cases) ("To the extent that this [Seventh Circuit] policy indicates an unwillingness to predict how the highest state court actually would decide an issue, it . . . directly encourages forum-shopping . . . ."); 1A *Moore's Federal Practice* ¶ 0.308, at 3079-80 (1993) ("Blind adherence to a state decision, without evaluating the decision in the light of other relevant data as to what the state law is, may result in injustice and a distortion of the state law which the federal court sets out to apply.").

II. THIS CASE IS A GRAPHIC ILLUSTRATION OF THE PROBLEMS CREATED BY THE SEVENTH CIRCUIT'S APPROACH TO DETERMINING STATE LAW IN DIVERSITY CASES.

This case clearly demonstrates what happens when a federal court is reluctant to anticipate how a state's highest court actually would handle a novel issue. The case, from its inception, was designed to take advantage of the fact that the Seventh Circuit applies state law more narrowly than do the state courts themselves. Moreover, if one looks at the reasoning of the Seventh Circuit, it becomes clear that this strategy worked: while the court of appeals purported to be applying "settled" state law, it in fact confined itself to a mechanical application of the single state decision that was most on point -- in a case where there was every reason to predict that the Illinois Supreme Court, if given the opportunity, would have rendered a very different decision.

A. This Case Began with Clear Forum-Shopping.

To begin with, there is little doubt that the reason this case was filed in federal court was AFM's hope that it would be able to take advantage of the Seventh Circuit's distinctive approach to

ascertaining state law.[9] Faced with strong indications from the Illinois Supreme Court and the First District Appellate Court that the State's public policy would not permit use of filing deadlines to deny the citizens of Chicago access to insurance funds needed to deal with a multi-million dollar asbestos crisis (*A, C&S* and *Wilkin*), respondent went forum-shopping. Rather than giving the Board the opportunity to litigate its claim, the company filed a preemptive declaratory judgment action in federal court on the very day that it denied the insurance claim.

Moreover, respondent did so with knowledge that the only appellate decision dealing with the specific issue raised in this case -- the application of a *contractual* filing deadline to a public body -- was a Second District Appellate Court opinion pre-dating *A, C&S* and *Wilkin* that enforced a contractual time deadline in a case where a village sought compensation for minor lightning damage to a pumping station. *See Village of Lake in the Hills v. Illinois Emcasco Ins. Co., supra.*[10] AFM plainly hoped that the federal courts would simply apply this decision, rather than making a prediction about whether the rule of *Lake in the Hills* would be

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[9] Respondent was certainly aware of the Seventh Circuit's approach, having itself tried unsuccessfully to persuade that court to predict a novel state-law rule. *See Affiliated FM Ins. Co. v. Trane Co., supra.*

[10] Although the circuit (trial) courts in Illinois are bound by appellate court decisions from any appellate district in the State, the decisions of one appellate district are not binding on the other appellate districts. *See, e.g., State Farm Fire & Casualty Co. v. Yapejian*, 605 N.E.2d 539, 542 (Ill. 1992). Hence, had AFM filed in the Circuit Court of Cook County, where the Chicago Board of Education is located, appeal would have been to the First District Appellate Court, which would not have been bound by the Second District's distinction between statutory and contractual limitations. *Id.* Instead, that Court would have been free to conclude that the public policy that the Illinois Supreme Court has held to outweigh statutory time limitations also outweighs contractual ones. In any event, the Illinois Supreme Court itself would have been the court of last resort for the lawsuit.

adopted by the Illinois Supreme Court and applied to the present, quite different dispute.

Unfortunately, the court of appeals then gave respondent precisely the ruling it sought. As we make clear *infra*, the court refused to consider the full range of factors that would have guided the decisionmaking of the Illinois Supreme Court if this case had been filed in state court. The court then further rewarded respondent's forum-shopping by refusing petitioner's request that it use the certification mechanism to give the Illinois Supreme Court the chance to consider the central public policy issues. As a result, in a case involving huge amounts of public funds, as well as the health and safety of students and teachers, petitioner never had a chance to plead its case either to the Illinois Supreme Court or to another court where the full range of state interests and concerns would be fairly considered. Such an approach transforms diversity jurisdiction into a strategic device for preventing vindication of state policy.

B. The Outcome in this Case Would Have Been Very Different if Developing Trends in State Law Had Been Applied.

At the time this case was decided, there was, as yet, no state appellate decision extending governmental immunity from filing deadlines under the *nullum tempus* doctrine to contractual deadlines. That extension, however, was virtually mandated by the reasoning and policies set forth by the Illinois Supreme Court in *A, C&S* and in other recent state-court decisions. That is why it is so clear that the outcome here turned on the Seventh Circuit's professed reluctance to predict new developments in state law. That court, having found a single highly distinguishable prior intermediate state court decision to rely on, did not even mention the factors that would have controlled the outcome if this case had been presented to the Illinois Supreme Court -- much less discuss or apply those factors. This Court has held that the "'nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction

the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result.'" *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 204 (1956) (quoting *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945)). That policy was not vindicated here.

In order to see what a dramatic difference the choice of forum made in this case, it is necessary to review the recent Illinois decisions applying the *nullum tempus* doctrine. That doctrine was applied both in *City of Shelbyville v. Shelbyville Restorium, Inc.*, 451 N.E.2d 874 (Ill. 1983), and, six years later, in *A,C&S*, *supra*. *Sheibyville* involved a claim that a developer had defaulted on his legal obligation to construct streets of specified quality in a new subdivision. As noted above, *A,C&S* involved the liability of asbestos manufacturers for the costs of removal of asbestos found in the schools of Chicago and various other Illinois communities.

In each case, the Illinois Supreme Court reaffirmed the principle that when important public rights are entrusted to the government to enforce, "the public should not suffer because of the negligence of its officers and agents in failing to promptly assert causes of action which belong to the public." *Shelbyville*, 451 N.E.2d at 876 (internal quotations and citations omitted); *see A,C&S*, 546 N.E.2d at 600-01 (enunciating same policy). In keeping with this principle, the Court held that the primary focus of *nullum tempus* analysis was whether the right the government entity sought to assert was "in fact a right belonging to the general public, or whether it belongs only to the government or to some small and distinct subsection of the public at large." *Shelbyville*, 451 N.E.2d at 877; *see A,C&S*, 546 N.E.2d at 601. It used three factors to determine whether the doctrine should apply: (1) the effects of the matter at issue on the public; (2) the government entity's responsibility to act on behalf of the public in the area involved; and (3) the extent to which the government entity's

finances would be affected by the right at issue. *A,C&S*, 546 N.E.2d at 602.[11]

Shelbyville and *A,C&S*, of course, involved application of *statutes* of limitation, whereas here the question is whether the Board should be barred from enforcing its rights under insurance policies because of a *contractual* requirement that suit be filed within one year of a loss. There is, however, every reason to believe that the Illinois Supreme Court would treat this case in the same way. The public policy concerns that the Illinois Supreme Court identified as underlying the *nullum tempus* doctrine are the same whether the suit-filing deadline was set by statute or was included in a contract signed by the governmental entity at issue. Here, for example, the impact on the public, the Board's duty to act, and the impact on public finances are *precisely the same* as in *A,C&S*, since we are talking about the same "loss." In either situation, the *public* stands to suffer merely because *public officials* failed to assert the public's rights on a timely basis.

In a closely analogous context, the Illinois Supreme Court has held that *minors* should not forfeit their rights under insurance contracts merely because their parents fail to file suit on their behalf within the time allowed under the contracts. *Severs v. Country Mut. Ins. Co.*, 434 N.E.2d 290, 292 (Ill. 1982). It reasoned that a default on the part of those charged with protecting the rights of minors should not be visited upon the minors themselves -- *i.e.*, that minors "are . . . entitled to special protection by the courts, particularly to see that their rights are protected *even from the*

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[11] Thus, in *Shelbyville*, the Court held that safe streets are an interest shared by all members of the public, that the city had a duty to protect this interest, and that barring a suit by the city to force the developer to repair the streets would have a significant impact on the public fisc. 451 N.E.2d at 877-78. In *A,C&S*, the Court held that asbestos in schools affected a public right, that school boards were duty-bound to deal with the problem, and that there would be an enormous impact on public finances if school boards were barred from suing the asbestos manufacturers due to delay in filing the suits. 546 N.E.2d at 601-02.

neglect of their representative." *Id.* (internal quotations omitted; emphasis added). It is difficult, in light of *Severs*, to imagine any basis for allowing the *public's* rights to be forfeited based on an official's failure to meet a contractual suit-filing deadline.

It is with these arguments in mind that one must assess the Seventh Circuit's assertion that "Illinois law is settled that an insured [governmental entity] is not immune from policy provisions requiring institution of suit within 12 months of loss." Pet. App. 5a-6a. That assertion was based almost entirely on a citation to the decision of the Illinois Appellate Court in *Lake in the Hills*, which itself gave scarcely more than cursory treatment to the question whether the *nullum tempus* doctrine applies to contractual filing deadlines.[12] "Settled," in the lexicon of the Seventh Circuit, simply means that the court had found a decision from a *single* lower state court, a decision that it could apply and thereby avoid thinking hard about how *this* case would actually be handled in the Illinois Supreme Court.

The Seventh Circuit reached this conclusion without even noting that the filing deadline at issue was statutorily mandated and without even discussing the public policy factors identified as central in the Illinois Supreme Court's *nullum tempus* cases. And it relied on *Lake in the Hills* even though that case treated the issue in a single paragraph, was easily distinguishable on its facts,[13] and

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[12] The Seventh Circuit also noted in passing the fact that a number of suits similar to the Board's were recently dismissed by a state trial judge, who rejected an extension of the *nullum tempus* doctrine. Pet. App. 4a. It is noteworthy, however, that both *A,C&S* and *Shelbyville* began with state trial court rejections of *nullum tempus* immunity. *See A,C&S*, 546 N.E.2d at 600; *Shelbyville*, 451 N.E.2d at 875.

[13] *Lake in the Hills* involved a claim totalling $35,000 -- hardly an amount likely to bankrupt a governmental entity. Moreover, there was no apparent issue of public safety in the case, since the claim arose from lightning damage to a "pumping station." 506 N.E.2d at 682. *Lake in the Hills* is thus easily

(continued...)

did not itself even mention, much less apply, the applicable public policy factors.

In sum, this is a textbook case demonstrating the problems with the Seventh Circuit's reluctant approach to finding state law in diversity cases. The outcome in this case was certainly affected by -- indeed can only be explained by -- that circuit's reluctance to "predict" what a state supreme court would do, along with its excessive deference to whatever decisions have been reached by intermediate state appellate courts in arguably analogous cases. Because this case was filed in federal court, petitioner never had the opportunity for full and fair consideration of the range of arguments supporting, if not compelling, extension of the *nullum tempus* doctrine from cases involving statutes of limitations to otherwise identical cases involving statutorily required contractual filing deadlines. Such an approach is not consonant with *Erie*, it promotes forum-shopping, and it frustrates the implementation of the sovereign states' clearly expressed public policy. This problem needs to be corrected.

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[13] (...continued)
distinguished as a case where there were no significant "public rights" at stake. Here, by contrast, the health of Chicago's students and teachers in dealing with asbestos in the school environment and the financial viability of its school system are directly and substantially implicated.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Bruce J. Ennis, Jr.
Counsel of Record

Barry Levenstam
Paul M. Smith
Stephen L. Wood
JENNER & BLOCK
601 Thirteenth
Street, N.W.
Suite 1200 South
Washington, DC 20005
(202) 639-6000

Counsel for Petitioner

Of Counsel:

Thomas R. Meites
MEITES, FRACKMAN,
MULDER & BURGER
135 South LaSalle Street
Suite 1425
Chicago, Illinois 60603
(312) 263-0272

Michael J. Hernandez
CHICAGO BOARD OF
EDUCATION
1819 West Pershing Road
Chicago, Illinois 60609
(312) 535-3785

Dated: September 6, 1994

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 93-2786
AFFILIATED FM INSURANCE COMPANY,
Plaintiff-Appellee,

v.

BOARD OF EDUCATION OF THE
CITY OF CHICAGO,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 90 C 6040 - **George W. Lindberg,** *Judge.*

ARGUED FEBRUARY 23, 1994--DECIDED MAY 12, 1994

Before FAIRCHILD, CUMMINGS and BAUER, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* Plaintiff Affiliated FM Insurance Company of Rhode Island ("Affiliated") sued the Chicago Board of Education ("Board") in a declaratory judgment action to determine whether a claim previously filed by the Board was barred because it did not commence suit within 12 months of a loss. The district court, sitting in diversity, held that the Board was not

immune from complying with the condition of the policies requiring commencement of suit within that period and therefore granted Affiliated's motion for summary judgment.

Facts

The Board claims that Affiliated should indemnify it for its asbestos removal and maintenance costs under four insurance policies in effect from 1978 to 1990 and providing coverage to the Board for all risks of physical damage to insured property. The Board's claim covers 600 of its facilities, constructed between 1946 and 1972, that contain asbestos materials.

The policies insured the risk of direct physical loss to the Board's properties incurred during each policy period, but they contained contractual provisions requiring that the insured give prompt notice of loss, and that any suit must be filed within 12 months of the occurrence of any loss. The Board did not give notice of the alleged loss until September 4, 1990, and did not file suit prior to Affiliated's bringing this declaratory judgment action. Affiliated claims that the Board was aware of asbestos hazards in its schools as early as 1978, and had sustained many of the losses for which it now claims compensation throughout the 1980s.

The magistrate judge held, and the district court agreed, that the Board had knowledge of the asbestos problem by May 1989 at the very latest, when a review[1/] conducted by the Board indicated that the cost of asbestos abatement in the Board's schools would exceed $500,000,000. On September 4, 1990, one and one-half years later, the Board first gave notice to Affiliated of a claim for coverage under the four property damage policies.

Affiliated denied the claim on October 17, 1990, due in part to the insured's failure to comply with the requirement in the

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[1/] The parties denominate the document reporting this conclusion as the AHERA Report because it was required by the Asbestos Hazard Emergency Response Act (15 U.S.C. § 2641 *et seq.*).

policies that any suit had to be filed within 12 months of the loss and also because prompt notice of loss was not given.[2] At the same time, Affiliated filed this action for a declaration that the costs incurred by the Board in removing and abating asbestos from its facilities were not covered. The Board answered and counterclaimed, alleging that Affiliated's denial was made in bad faith. Dispositive motions were referred to Magistrate Guzman in November 1991.

The magistrate recommended that the Board's claim that Affiliated's denial was made in bad faith be dismissed except for the Board's claim for attorney's fees and costs and damages up to $25,000. Subsequently Affiliated filed a motion for summary judgment and the magistrate found that the 12-month suit limitation provisions of the policies had been breached by the Board. However, he recommended that the district court deny summary judgment on the ground that the Board was immune from limitations under *Board of Education of City of Chicago v. A, C and S, Inc.*, 131 Ill. 2d 428, 546 N.E.2d 580 (1989), which dealt with a statute of limitations rather than a contractual provision in the policies themselves.

After objections to the magistrate's recommendation were made, the district court issued an opinion rejecting the Board's claim of immunity from the contractual limitations provision and granted Affiliated summary judgment because of the Board's failure to file suit in the 12-month period provided under the terms of each policy. The court did not reach the question whether the Board had given Affiliated the requisite prompt notice of the claim. Subsequently the district court dismissed the Board's bad faith claims on the ground that its summary judgment in Affiliated's favor was based on no coverage.

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[2] The four policies respectively required "immediate notice" of loss, notice "as soon as practicable," and reporting the loss "promptly" (SA 6-7).

Contractual limitations bar

Here no suit was instituted by May 1990 although the Board discovered the loss at the latest by May 1989. Consequently the Board concedes that the 12-month contractual suit limitations provisions were breached[3] unless the Board was immune from its provisions as a public entity. To avoid the limitations defense, the Board insists that it is immune from the contractual provision under the doctrine of *nullum tempus occurrit regis* ("time does not run against the king"). However, Illinois precedent has established that municipalities may bind themselves to suit initiation limitations by contract. *Village of Lake in the Hills v. Illinois Emcasco Ins. Co.*, 153 Ill. App. 3d 815, 506 N.E.2d 681 (2d Dist. 1987), leave to appeal denied, 116 Ill. 2d 560, 515 N.E.2d 128 (1987). The parties inform us that this reasoning was follows by the Circuit Court of Cook County which recently held that several Boards of Education were not immune from contractual suit initiation provisions. *Home v. Evanston Township H.S. Dist. No. 202*, No. 92 CH 11144; *Continental v. Township H.S. Dist. No. 214*, No. 93 CH 01703; *Aetna v. Community Consol. School Dist. No. 21*, No. 93 CH 3200, consolidated with No. 93 CH 5642; *Community Consol. School Dist. No. 15 v. Centennial*, No. 93 CH 08069; *Northfield Township H.S. Dist. No. 225 v. Ins. Co. of North America*, No. 93 CH 017143; *Consol. H.S. Dist. No. 230 v. Ins. Co. of North America*, No. 93 CH 07976; *Board of Education of Township H.S. Dist. No. 211 v. International Ins. Co.*, No. 93 CH 000771; *Board of Education of Main Township H.S. Dist. No. 207 v. International Ins. Co.*, No. 93 CH 6766.

Board of Education of City of Chicago v. A, C and S, Inc., 131 Ill. 2d 428, 546 N.E.2d 580 (1989), is not to the contrary because it involved a statute of limitations rather than contractual terms, and the Illinois Supreme Court has acknowledged that public

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[3] See *Naghten v. Maryland Casualty Co.*, 47 Ill. App. 2d 74, 197 N.E.2d 489 (1st Dist. 1964).

entities are not immune from performing contractual obligations. *Wall v. Chicago Park Dist.*, 378 Ill. 81, 37 N.E.2d 752 (1941). It has long been settled that it is appropriate for suit limitations to be contained in insurance policies. *Peoria Marine and Fire Ins. Co. v. Whitehall*, 25 Ill. 382, 392 (1861); *Schoonover v. American Family Ins. Co.*, 214 Ill. App. 3d 33, 572 N.E.2d 1258 (4th Dist. 1991), leave to appeal denied, 141 Ill. 2d 560, 580 N.E.2d 134; *McMahon v. Millers National Ins. Co.*, 131 Ill. App. 2d 339, 266 N.E.2d 714 (1st Dist. 1971); see also *Koclanakis v. Merrimack Mut. Fire Ins. Co.*, 899 F.2d 673, 675 (7th Cir. 1990) (following Illinois law). The insurance contracts at issue here conditioned the Board's right to receive recovery on its agreement to bring any suit for benefits within 12 months. Without such a limitation, Affiliated would obviously have demanded a higher premium and set other conditions in the policy. Under Illinois law, the district court properly held that the limitations clauses in the policies entitled Affiliated to judgment.

Since the Board breached the contractual 12-month period for bringing suit, it is unnecessary to consider whether it is also barred for failure to give the prompt notice of loss required by the policies.

Certification to the Illinois Supreme Court

In a motion for certification, the Board has asked us to certify the following question to the Illinois Supreme Court:

> Whether appellant Chicago Board of Education as a public entity enforcing public rights is immune under the doctrine of *nullum tempus* from suit limitations provisions in its property insurance policies when seeking to recover for asbestos-related property damage.

However, cases cited above have convinced us that Illinois law is settled that an insured is not immune from policy provisions

requiring institution of suit within 12 months of loss.[4] Therefore certification would be inappropriate and probably unsuccessful as we have seen in recent instances where certification has been denied. See, *e.g.*, *Todd v. Societe BIC, S.A.*, 9 F.3d 1216 (7th Cir. 1993) (en banc) (certifying questions of state law to the Illinois Supreme Court), 1994 WL 124023 (7th Cir. April 12, 1994) (en banc) (deciding issues after certification was denied).

Judgment affirmed.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[4] While the Board also asked us to certify two questions concerning notice under the policies, we have not decided this case on lack of notice and therefore there is no reason to certify those questions.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

AFFILIATED FM INSURANCE COMPANY,	)	
Plaintiff,	)	No. 90 C 6040
v.	)	Hon. George W. Lindberg
BOARD OF EDUCATION OF THE CITY OF CHICAGO,	)	
Defendant.	)	

JUDGMENT

Judgment is granted in favor of plaintiff, Affiliated FM Insurance Company, and against defendant, Board of Education of the City of Chicago, on the Seventh Count of plaintiff's Complaint for Declaratory Judgment. It is hereby declared that any claim by defendant based upon the presence of asbestos-containing materials in its buildings or the necessity of removing or otherwise abating the presence of asbestos-containing materials in said buildings, is not recoverable under the Affiliated insurance policies issued to defendant, namely Policy Nos. A4721, F6599, I6227 and EA412, because suit on those policies is barred by the policies' provisions requiring defendant to bring suit within twelve months after the inception of loss.

The remaining counts of plaintiff's Complaint for Declaratory Judgment are dismissed as moot.

Counts I and II of the defendant's Second Amended Counterclaim are dismissed with prejudice.

George W. Lindberg
District Judge

DATED: [July 2, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

AFFILIATED FM INSURANCE COMPANY,	)	
Plaintiff,	)	No. 90 C 6040
v.	)	Hon. George W. Lindberg
BOARD OF EDUCATION OF THE CITY OF CHICAGO,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff, Affiliated FM Insurance Company (AFM), moved for summary judgment against defendant, Board of Education of the City of Chicago (the Board). FRCP 56. The Board moved pursuant to Rule 56(f) for a continuance. FRCP 56(f). The Magistrate Judge, on October 5, 1992, recommended that AFM's motion for summary judgment be denied and that the Board's Rule 56(f) motion be granted.

On the view this court has taken of this case, further discovery is not necessary to decide the motion for summary judgment. Therefore, the Board's Rule 56(f) motion will be denied. FRCP 56(f).

Both parties have objected to the Magistrate Judge's report and recommendation of October 5, 1992. The court has reviewed de novo the objected to portions of that report and recommendation. The court agrees with most of the Magistrate Judge's report and

recommendation. However, the court disagrees with a portion of the report and recommendation and with the recommended decision. The recommended decision will therefore be rejected. 28 U.S.C. § 636(b)(1); FRCP 72(b).

It is the recommendation with respect to Count 7 of the complaint, the suit limitations defense, with which this court disagrees. The report and recommendation states the facts in great detail, which facts need not be exhaustively recited here.

Certain portions of the facts and conclusions of the report and recommendation are worth noting, however. The report and recommendation summarizes the relevant provisions of the insurance policies at issue as follows:

> [I]n its [the Board's] 1978 policy, suit was to be commenced within one year "next after inception of the loss." The 1983 policy did not incorporate the standard fire policy form, using instead AFM's own Form 2293, Special Policy Conditions. Here, the suit limitations period begins to run "after discovery by the insured of the occurrence which gives rise to the claim." Further, Form 2293 provides in provision 23 that the "[t]erms of the policy which are in conflict with the statutes of the state wherein this Policy is at issue are hereby amended to conform to such statute." The 1985 policy also contained the same Special Policy Conditions Form 2293, with its discovery standard. The 1985 policy, however, contained form APP-1, which had a different suit limitations provision. This provision stated that suit is to be commenced with[in] 12 months "after the happening of the loss, unless a larger period of time is preserved by applicable statute." Finally, the 1988 policy has only the APP-1 limitations provision.

With respect to the date from which the suit limitations period began to run, the report and recommendation stated:

> Taking the facts most favorable to the Board, it is undisputed that the review conducted pursuant to the AHERA and completed in May, 1989, gave the Board a comprehensive summary of the levels of ACM's contained in its school buildings. This May of 1989 date is really giving the Board the benefit of the doubt because a true question of fact remains as [to] the Board's knowledge with respect to the work done at the Fenger and Price schools. It is not clear that the abatement done at these schools was because the buildings had dangerous levels of contamination which exceeded regulatory guidelines. What AFM has failed to establish is precisely when the Board had knowledge that its buildings had asbestos which reached dangerous levels. It is beyond doubt, however, at the very latest the Board had to know this by May of 1989 when its AHERA report was completed.

The court agrees with this conclusion of the Magistrate Judge, as well as with his conclusion that:

> [T]he limitations period should not be tolled by the fact that the Board was waiting for a decision in [the cases of] *Board of Education v. A, C, and S*, and *Wilkin*. If this legally unsupported argument was accepted by this court any plaintiff could simply allege ignorance of his or her legal rights against a particular defendant.

The argument is also unsupported by the language of the policies. Thus, this court and the Magistrate Judge agree that, assuming the applicability of the suit limitation provisions of the insurance policies, those provisions would bar the Board from bringing suit for the asbestos-related claims at bar.

The concluding paragraph of the report and recommendation on this issue states:

> AFM's argument that the Board consented to this one year period of limitations is well taken, and ordinarily the terms of the contract determine the rights of the parties. I believe, however, that an exception arises in an instance

> such as this one, where latent injuries of the type suffered as a result of exposure to asbestos is [sic] in question. This conclusion is supported by the reasoning applied in *A, C, and S*, where the court stated that they [sic] could not ignore the health concerns involved and the interest in the safety of the public buildings and a large segment of this State's population which attends the public schools and for the children who will in the future attend these schools. The court also noted the interest of the parents, faculty, staff, and other people who use or will use the public school system. *A, C, and S*, at 601. Finally, the Illinois Supreme Courts [sic] recent decisions in *Wilkin* and *A, C, and S*, infer that the health concern resulting from contaminated asbestos is paramount to procedural concerns. Therefore, I am recommending that the doctrine of municipal liability applies to the instant case and the Board is not barred by AFM's one year limitations period.

It is here that this court parts company with the report and recommendation. While *United States Fidelity & Guaranty Company v. Wilkin Insulation Company*, 144 Ill. 2d 64, 578 N.E.2d 926 (1991), and *Board of Education v. A, C, and S, Inc.*, 131 Ill. 2d 428, 546 N.E.2d 580 (1989), do involve asbestos giving them a factual similarity to this case, they do not involve the legal question presented by the case at bar.

This court believes that the Illinois Supreme Court, if presented with the issue at bar, would agree with the following statement of the Illinois Appellate Court:

> Plaintiff contends, however, that, as a municipality, it is exempt from the time limit provision. Plaintiff relies on *City of Shelbyville v. Shelbyville Restorium, Inc.* (1983), 96 Ill. 2d 457, 71 Ill. Dec. 720, 451 N.E.2d 874, to support its argument. We find the case inapplicable, however, because, contrary to plaintiff's contention, *Shelbyville* did not declare a doctrine rendering municipalities immune from limitation defenses. Rather,

> *Shelbyville* simply determined that neither the 1970 Illinois Constitution (Ill. Const. 1970, art. XIII, sec. 4), nor any decision of the Illinois Supreme Court has abolished the common law doctrine of governmental immunity from statues of limitation. . . . The suit limitation at issue here is neither a statute of limitation, nor an *ultra vires* attempt by a municipal officer to waive the municipality's immunity from the applicable statute. (*Cf. S.J. Groves & Sons, Co. v. State of Illinois* (1982), 93 Ill. 2d 397, 404-05, 67 Ill. Dec. 92, 444 N.E.2d 131 (by entering a contract a State agrees to be bound by its terms, but such agreement does not imply an intention to waive its immunity from suit).) Rather, it is a contractual agreement by which plaintiff affirmatively agreed to commence suit on the policy within one year from the date of any covered loss. Plaintiff's complaint affirmatively establishes that plaintiff did not comply with that provision. We therefore conclude that the trial court properly granted Emcasco judgment on the pleadings and properly denied plaintiff's motion for leave to amend.

Village of Lake in the Hills v. Illinois Emcasco Insurance Company, 153 Ill. App. 3d 815, 506 N.E.2d 681, 684 (1987). Neither the *Wilkin* case nor the *A, C, and S* case suggests that there is an exception to this rule for asbestos-in-school-buildings claims. Nor does the fact that there may be regulations having the force of law requiring certain time limit provisions in insurance policies change this court's conclusion that the provisions at issue are contractual time limit provisions subject to *Village of Lake in the Hills* rather than statutes of limitations subject to *City of Shelbyville*.

Bolstering the court's conclusion that the contractual time limits should be enforced is a consideration of the nature of the contracts at issue. The contracts at issue are contracts of insurance. Presumably, AFM's determination to charge and the Board's agreement to pay the premiums were in part based upon predictions made by AFM's actuaries as to the costs of claims which could be expected under the policies. That risk is obviously considerably

less if the Board is required to comply with the one year suit limitations provisions of the policies than it would be if those provisions are wholly or even partially ineffective. There would be considerable unfairness to AFM in not enforcing the clear suit limitation provisions of the policies at this late date; while enforcing those provisions is wholly in line with what the Board could have anticipated when it signed the policies containing those provisions. Moreover, while this court cannot predict precisely the effect a rule of law that made suit limitations provisions unenforceable against governmental bodies in some circumstances would have, it is fair to say that the effect would be adverse with respect to the premiums paid by and the ability to obtain insurance of those bodies because it would increase the risk assumed when the insurance is written.

The limited issue on which this motion is decided concerns the application of the suit limitations provisions of the policies. The court has not relied upon the notice of claims provisions of those policies. Under Illinois law the two periods are in some cases related:

> Whenever any policy or contract for insurance . . . contains a provision limiting the period within which the insured may bring suit, the running of such period is tolled from the date proof of loss is filed, in whatever form is required by the policy, until the date the claim is denied in whole or in part.

Ill. Ann. Stat. ch. 73, § 755.1 (West 1992 Supp.). The Board did not submit its proof of loss until September of 1990. Tolling the suit limitation period from that date to the date on which the claim was rejected in October of 1990 is of no assistance to the Board in this case since the suit limitation period began at the latest in May of 1989.

ORDERED: The recommended decision contained in the Magistrate Judge's October 5, 1992, report and recommendation is rejected. 28 U.S.C. § 636(b)(1); FRCP 72(b). Plaintiff Affiliated FM Insurance Company's motion for summary judgment

is granted. Defendant Board of Education of the City of Chicago's motion pursuant to Rule 56(f) is denied.

ENTER:

George W. Lindberg
District Judge

DATED: [June 2, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

AFFILIATED FM INSURANCE COMPANY,	)	
Plaintiff,	)	
v.	)	**No. 90 C 6040**
BOARD OF EDUCATION OF CITY OF CHICAGO,	)	
Defendant.	)	

TO: HONORABLE GEORGE W. LINDBERG, JUDGE
UNITED STATES DISTRICT COURT

HONORABLE SIR:

REPORT AND RECOMMENDATION
of Magistrate Judge Ronald A. Guzmán

Pending is plaintiff Affiliated FM Insurance Company's ("AFM") motion for summary judgment. Also pending is defendant Board of Education of the City of Chicago's ("Board") motion for a continuance pursuant to Federal Rule of Civil Procedure 56(f).

BACKGROUND FACTS

On October 17, 1990 AFM, a property insurer headquartered in Johnstown, Rhode Island, filed this diversity declaratory judgment action against the Board. AFM is a wholly-owned subsidiary of Allendale Mutual, a large property insurer which has

a Best's A + rating. The cornerstone of the Allendale family of insurance companies and AFM is its unique program of rigorous property inspections for loss prevention. Thus, AFM insisted as a precondition to insuring the Board's schools as well as during the term of insurance, that the Board would agree to regular inspections of its property by AFM or its agents.[1]

AFM first began insuring the Board in 1972[2] and since December 1978 had continuously insured the Board under "all-risks" policies. The policies were in the form of three-year contracts from 1978-1981; 1981-1984; 1984-1987 and 1987-1990; AFM policies, A4721, effective December 11, 1978 - December 11, 1981; F6599, effective January 11, 1982 - January 11, 1985; I6227, effective December 11, 1984 - December 1987; EA412, effective December 11, 1987 - January 1991.[3] In the fall of 1978, with the forthcoming expiration of the 1975 AFM policy, the Board used bid solicitation documents which invited bids for both named peril and all-risk coverage. "All-risk" coverage was defined in the specifications as "all-risks of direct physical loss or damage to the insured property from any external cause, except as hereafter excluded." The losses which could be excluded were:

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[1] AFM paid directly or indirectly for those inspections and insisted that they be reported on AFM or AFM approved forms. Yearly inspections of elementary schools continued through 1982; thereafter, they were inspected every three years. AFM continued the practice of obtaining yearly inspections of all Board high schools throughout the policy period. The inspection reports included listings of risks and changes in conditions relevant to coverage provided at the buildings at issue, with recommendations of what the Board needed to do to cure the problem.

[2] The first policy as well as the renewal policy in 1975 was in "named-peril" form. That is, AFM agreed only to pay for losses caused by events specifically identified in the policy. The causes of loss in the 1972 and 1975 policies included fire, vandalism and theft. Although the Board regularly suffered known losses from these causes during the term of both the 1972 and 1975 policies, none remotely approached $1,000,000 and the Board filed no claims.

[3] Amended Answer to Complaint, ¶10, May 1992.

(1) delay or loss of market . . .; (2) inherent vice, natural deterioration, wear and tear, etc.; (3) infidelity and dishonesty, etc.; (4) extremes of temperature, dampness of atmosphere, etc.; (5) nuclear exposures; and (6) war risks. The specifications also required loss occurrence to be defined as "all losses arising out of one event." At this time, the Board included a detailed listing of fire, vandalism, and theft losses for the preceding ten years. The specifications provided information in some detail about school buildings of the Board. However, the specifications made clear that:

> "appropriate investigations and inspections have been made or waived and that the insurance company and its representatives are fully informed as to the extent and character of the exposures, hazards, and the requirements of the specifications."

The specifications further provided that while the Board believed the information provided in the specifications was current and complete "no warranty is made or implied as to the information contained in these specifications and data." The Board's insurance specifications were essentially the same, excluding property descriptions, from 1978 through 1987. AFM received copies of these specifications. In its 1978 bid, AFM indicated its interest in offering either named peril or all-risk coverage, with a considerably higher premium for all-risk than for named peril. The 1978 Insurance Proposal, with a $1,000,000 deductible, quoted an annual premium of $760,000 for all-risk, versus an annual premium of $650,000 for named peril. The difference in cost was succinctly explained by the Board's broker, Charles DeBruler of A.J. Gallagher & Co.: "[t]he difference in named perils and all-risk must be judged on the value placed on the additional major perils of flood, earthquake, collapse or unknown perils not excluded." The Board thereupon decided to take the all-risks coverage in spite of the additional cost.

The 1978 all-risk policy was to be in effect for three years, until December 1981. The Board retained the risk for the first $1,000,000 per occurrence and AFM's per occurrence limit of liability was $40,000,000 per location. The Board's coverage was the responsibility of AFM's Oak Brook, Illinois regional office. Because of the large dollar amount of the risk involved the regional office required approval of the underwriters in AFM's home office in Rhode Island.

The Board had elected to take an extraordinarily high, $1,000,000 per event deductible under the policy so the Board could self-insure for ordinary losses while transferring the risk of catastrophic losses to AFM. From 1972, when AFM first began insuring the Board until the present claim, the Board filed no claims whatsoever under the policy.

In May, 1981 AFM had learned from its periodic inspection reports that the Board had begun abating dangerous asbestos. In a report dated May 15, 1981 on the Mayer School, AFM's contract inspector noted:

> "this building was tested for asbestos and was found that the ceilings in the corridors contain asbestos fibers. As a result, the ceilings are scheduled to be torn out this summer and replaced."

A similar report of the Wicker Park School, dated September 16, 1981 noted that the Board had removed asbestos ceilings. AFM procedures required that engineering personnel bring to the underwriter's attention any "problems."

AFM renewed the Board insurance in January, 1982 under similar specifications as 1978 and with a million dollar risk retention to the Board. AFM did not, however, include in its renewal policy, an exclusion for loss caused by asbestos in particular, or more generally, for loss caused by unreasonably dangerous products. During the three-year policy period, although the Board suffered fire, vandalism, and other known covered

property losses during the period, none exceeded $1,000,000 so no claims were filed during 1982-1984.

AFM renewed the Board's all-risk insurance in 1984 under essentially the same bid specifications as 1978 and 1981. The self-insured retention remained at $1,000,000. The total amount insured under the 1984 policy was nearly $3 billion with the maximum per loss occurrence $40 million per location and $92 million for the Board's administrative headquarters.

The blanket $40 million per location limit was revised on December 11, 1985 to specific amounts per location. This change was made to accommodate General Reinsurance Corporation ("Gen Re"), the reinsurer, for all of the Board's buildings which were valued at over $10,000,000, excluding the Board's administrative center. At this time, AFM did not add any exclusion for loss caused by asbestos. The Board continued to suffer known covered property damage losses during the period in a number of schools, but none exceeded $1 million so no claims were filed.

The Board's all-risk policy was renewed a final time, again for three years, by AFM in December, 1987. Before its issuance, AFM continued to receive inspection reports indicating that the Board's schools contained asbestos which it was abating. In August 1985 and November 1986 AFM learned that asbestos ceiling tile was being removed in Kennedy High School. AFM received a similar report in October 1986 as to Dunbar School.

The policy issued by AFM in December, 1987 contained no asbestos exclusion or any exclusion for losses caused by unreasonably dangerous products. The 1987 policy again was all-risks in form, with a total insured valuation exceeding $4 billion. The Board's self-insured retention was reduced to $500,000 and the limits of liability per occurrence continued to be set on a building-by-building basis.

In August, 1986 Gen Re informed AFM of its new policy of refusing to reinsure more than 70% of AFM's coverage to a school

district unless the reinsurance agreement contained a comprehensive asbestos exclusion. In response to an inquiry from Peter Maple, the AFM underwriter responsible for the Board's account, Allendale's home office underwriting staff responded that the exclusion proposed by Gen Re was unacceptable because it would create "gaps" in coverage between what AFM had insured the Board for and what AFM could reinsure with Gen Re. AFM did not use this or any other asbestos exclusion in the policy it issued to the Board for the period of December, 1987-December 1990.

Bans on the use of asbestos in construction, based on widespread recognition of its dangers, pre-dated all the policies in issue. As early as 1973, the Environmental Protection Agency ("EPA") addressed the issue of asbestos in buildings when the Clean Air Act banned the spraying of asbestos for fireproofing and insulation in new construction, 42 U.S.C.A. §1857 *et seq.*; 40 C.F.R. §61; "National Emission Standards for Hazardous Air Pollutants: Asbestos," Federal Register, Vol. 39, No. 77, 1973.

In 1975, the EPA banned the use of asbestos in pipe covering and boiler lagging. EPA Orange Book I, p.4, Ex. I. In 1978, the EPA banned asbestos spraying in buildings for nearly all purposes. EPA Orange Book, Part I, p.3, Ex. I. From 1975-1979, much material was published warning of the potential dangers of ACMs particularly in schools. In October, 1975 the EPA prepared a report warning about the health effects of "contamination of building air" as a result of the past uses of ACM in buildings. The report and study reported results from air sampling of selective buildings, including two buildings in Chicago.[4] On August 18, 1978 Joseph Califano, then Secretary of HEW, wrote to the governor of each state urging that public health and school officials review the asbestos problem and determine "whether it is prudent to eliminate from schools and other public buildings potential sources of exposure to asbestos." Accompanying this letter was a

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[4] AFM's Exhibit H.

report prepared by the Mount Sinai School of Medicine calling attention to a possible general problem nationwide, stating that friable asbestos was found to exist in schools across the country.[5] One of the authors of this report, Dr. Robert Sawyer, was subsequently employed by the Board as a consultant to assess the asbestos hazard in Chicago schools.[6] In March 1978, the EPA published a guidance document "Hazard Abatement From Sprayed Asbestos Containing Materials In Buildings."[7] In March 1979, federal legislation mandated schools to identify facilities with ACMs[8] and the EPA issued a guidance packet regarding asbestos abatement to public school districts throughout the country entitled "Asbestos Containing Materials in School Buildings" (Orange Books I and II).[9]

As a result of both state and federal bans on the use of asbestos, and other factors, Chicago area schools became aware of the rising concern over health risks associated with asbestos commencing in 1973. ACMs had been incorporated into the Board's buildings from 1946 to 1972. Intact and undisturbed asbestos materials do not pose a health risk. The mere presence of asbestos in a building does not mean that the building occupants are endangered. ACM which is in good condition, and is not somehow damaged or disturbed, is not likely to release asbestos fibers into the air.[10] Asbestos fiber release is a result of the inherent characteristics of ACM, the reasonably foreseeable use of asbestos

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[5] AFM's Exhibit G.

[6] AFM's Exhibit U.

[7] AFM's Exhibit H.

[8] AFM's Exhibit R.

[9] AFM's Exhibit I.

[10] AFM's Exhibit Y.

product and the normal and expected activities which occur in schools.[11] Friable ACMs have an inherent tendency to release fibers from deterioration with age and normal usage.[12] Asbestos becomes friable and may become dangerous as a result of deterioration and wear and tear.[13] The continual release of fibers is a natural behavior of ACM in a school building because the conditions which accelerate the process of fiber release are especially present in such buildings. The only way to determine whether and to what extent asbestos-containing materials are present in a building is to physically inspect the building and have bulk samples of suspect materials analyzed. Further, while undertaking mechanical rehabilitations of its facilities in the 1970s, the Board specifically installed fiberglass whenever it became necessary to replace the existing insulation. Later, while undertaking school inspections for friable asbestos required by the Asbestos Hazard Emergency Response Act, 15 U.S.C. §2641(a)(1) ("AHERA"), the Board's inspectors noted that these conversions of the insulating material eliminated the concern over asbestos when he wrote "Partial Abatement 1975 New Boilers and Some Piping F.G. Around Boilers and Bathrooms." "Much of the pipe wrap was changed over to F.G. in 1974 with the installation of the boilers."[14]

By the spring of 1977, the Board had contacted and met with the Illinois Institute of Technology Research Institute ("IIT/RI"), an asbestos testing contractor, to seek bids for air sampling for

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[11] AFM's Exhibit I.

[12] AFM's Exhibit I.

[13] AFM's Exhibit J.

[14] AFM's Exhibit M.

asbestos contamination in some of its schools.[15] At this time, IIT/RI proposed to measure the airborne concentrations of asbestos fibers in Ignace Paderewski Elementary School, Morgan Park High School and John Whistler Elementary School.[16] Likewise, the National Loss Control Service Corporation proposed to measure the airborne concentrations of asbestos fibers in Dewey Elementary, Brenneman Elementary and Kennedy High School. Thereafter, on December 20, 1978, Board passed a resolution to test six of its buildings and authorized expenditures to hire contractors to initiate a pilot project to test airborne asbestos in its schools as follows:

> "We authorize the performance [of] an analytical study to determine the level of airborne asbestos fiber present in schools where this material was used in the construction process. This is a pilot project using representative schools in various locations of the city of Chicago."[17]

As a result of this pilot project, in March 1979 the Board was advised that no dangerous levels of airborne fibers were found in the three buildings analyzed. Specifically, the results were as follows: at Dewey Elementary School no airborne fibers were found; at Brenneman School airborne fibers were found but bulk sample analysis showed that no asbestos was present; at the third, Kennedy High School, airborne fibers were found and the presence of asbestos was then confirmed by bulk sampling, but the fibers found were measured at very low levels--less than three percent of OSHA's standard and under 10 percent of the stricter standard established by the City of Philadelphia. For Kennedy High School only, the inspectors suggested removal of any ACM ceilings in a poor state to avoid potential fiber release. The Industrial Hygiene

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[15] Correspondence between the Board's Bureau of Architecture and the Illinois Institute of Technology Research Institute. AFM's Exhibit N, O.

[16] AFM's Exhibit N.

[17] AFM's Exhibit P.

Report also recommended that the Board "remove any asbestos-containing ceiling which is in a state of deterioration. Such a ceiling can only release higher numbers of fibers with the passage of time and continued neglect. . . . ideally the entire ceiling should be removed as it can only continue to deteriorate thus increasing asbestos concentrations."[18] For the fiscal year 1979-1980, the Board appropriated over one million dollars for abatement administration and supervision.[19]

On June 8, 1979, the Board received a report from IIT/RI which found in the three buildings analyzed (Whistler Elementary School, Morgan Park High School and Paderewski Elementary School): airborne fibers "well below the current OSHA standard . . . and recommended NIOSH limits." Although bulk samples of materials at two buildings--Whistler and Morgan Park--were tested and found to contain asbestos, IIT/RI recommended only that the Board implement a monitoring program. For fiscal year 1979-1980, the Board appropriated over one million dollars for abatement administration and supervision.[20]

In August 1980, the Board established a formal asbestos abatement program and passed a resolution to temporarily close three schools and shut down portions of two others until suspicious materials in these buildings were inspected, sampled and analyzed by a reputable laboratory and in every case were found not to contain asbestos.[21] Fifty-two other schools were placed on an asbestos abatement management program.[22] In 1980-81, the

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[18] AFM's Exhibits P & Q.

[19] AFM's Exhibit V.

[20] AFM's Exhibit V.

[21] AFM's Exhibits U & S.

[22] AFM's Exhibit S.

Board employed Battelle Laboratories to train administrators and staff in asbestos abatement procedures, conducted a second phase of sampling in schools, identified ninety schools containing asbestos materials potentially hazardous to health, consulted with nationally recognized asbestos abatement experts, and established a budget classification for asbestos programs. In May, 1981 AFM learned from its periodic inspection reports that the Board had begun abating asbestos in the Mayer School. AFM's contract inspector noted: "this building was tested and was found that the ceilings in the corridors contain asbestos fibers. As a result, the ceilings are scheduled to be torn out this summer and replaced." By 1981, the Board had expended $500,000 on asbestos abatement in schools.[23]

In 1982-1983 the Board abated and/or removed almost a million square feet of asbestos materials, completed abatement of eighty-two schools, and expended $2.7 million on asbestos abatement. By 1984, the Board had expended over $9.0 million on asbestos abatement.[24] During the 1982-1984 policy period, the insured never gave notice to AFM of a loss or claimed loss for "asbestos related property damage." In 1986, a fire destroyed one of the Board's schools, Sherman School Branch. As a predicate to filing a claim, the Board engaged Gallagher-Bassett, an inspection and adjusting firm, to investigate the loss and determine whether it exceeded the deductible. On finding the loss was at most approximately $684,000, the Board determined that it had not suffered a covered loss given that the deductible then was $1 million and filed no claim.

In January 1985, the Board filed a claim in the Johns-Manville bankruptcy proceedings to preserve its right to recovery of expenses incurred for asbestos abatement from the Johns-Manville Property Damage Settlement Trust. Only general claims were submitted at

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[23] AFM's Exhibits U & S.

[24] AFM's Exhibit U.

that time in the proceeding because a reorganization plan had not as yet been submitted and approved by the Court. That claim stated "claimant has suffered and/or will suffer asbestos-related property damage" resulting from the presence of asbestos or asbestos containing products.[25]

In December, 1986, AFM along with numerous other insurers was sued by National Gypsum, which demanded that its insurers pay the cost of defense and indemnify for any amounts it ultimately had to pay in suits by asbestos purchasers such as that brought by the Board. *Stonewall Insurance Co. v. National Gypsum*, 86 C. 9671 (D. Ct., S.D.N.Y.). Although the Board has been denied discovery on this issue and the pleadings in this litigation are under seal, it would be expected that in the course of discovery AFM and the other insurers would have learned the identity of the school districts asserting asbestos-related claims, including the Board. Nonetheless, the policy issued by AFM in December, 1987 contained no asbestos exclusion or any exclusion for losses caused by unreasonably dangerous products. The 1987 policy again was all-risks in form, with a total insured valuation exceeding $4 billion. The Board's self insured retention was reduced to $500,000 and the limits of liability per occurrence continued to be set on a building by building basis.

As of October 31, 1990, the Board had spent more than $1 million for abatement at only six of its buildings: Calumet High School, Fenger High School, Kenwood Academy, Lathrop Elementary, Price Elementary, and Roosevelt High School. Costs at these buildings first exceeded $1 million during the summer of 1988, when $1 million was spent at Price Elementary School and over $360,000 was added to amounts previously spent at Fenger High School.

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[25] AFM's Exhibit T.

In May of 1989 the Board completed its federally-mandated AHERA reports, which were inventories of asbestos containing materials at all 630 of its buildings. The Board then had the data from all 600 buildings plus the AHERA report summarized into a report showing estimated costs for removing all ACM in its buildings. The May 1989 report showed that some 630 of the Board's buildings had dangerous asbestos, and reported that remediation costs would exceed $1 million as to approximately 120 buildings and $500,000 as to approximately 68 additional buildings.

In January, 1985, the Board filed a complaint in Illinois State Court, 85 CH-00811, against several asbestos manufacturers seeking recovery for asbestos damage caused by the manufacturers' sale and installation of asbestos in its schools which occurred from 1946-1972. *Board of Education of the City of Chicago v. A, C, and S, Inc.*[26] On August 14, 1987, the Circuit Court of Cook County ruled in favor of the insurers and held that the Board's allegations of injury were not property damage under the policy. 144 Ill. 2d 64, 578 N.E.2d 926, 928-29 (1991). On December 8, 1988, the Illinois Supreme Court granted a petition for leave to appeal filed by the manufacturers sued by the Board. Among other things, the manufacturers asked the court to find that the Board's injuries were solely economic losses and not property damage. *Board of Ed. v. A, C, and S, Inc.*, 131 Ill. 2d 428, 546 N.E.2d 580, 585 (1989). On October 25, 1989, the Illinois Supreme Court ruled for the Board in its suit, holding that the Board's allegations in strict liability and negligence constituted cognizable property damage. *Board of Education*, 131 Ill. 2d 482, 546 N.E.2d at 591.

In a second state court suit, this one brought by one of the defendants named by the Board, Wilkin Insulation, against its insurers, Wilkin had asked for a declaration that the insurers had to pay the cost of Wilkin's defense and indemnify for any amounts

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[26] AFM's Exhibit J.

it was obliged to pay the Board because, in Wilkin's view, the Board's allegations amounted to property damage under Wilkin's insurance policies. *U.S.F.&G. v. Wilkin Insulation Co.*, 144 Ill. 2d 64, 578 N.E.2d 926, 928-29 (1991).

On December 28, 1989 the Illinois Appellate Court in the *Wilkin* litigation, relying on *Board of Education*, reversed the trial court and held that the Board's allegations constituted property damage for purposes of Wilkin's insurance policy. 193 Ill. App. 3d 1087, 550 N.E.2d 1032. Thus, Wilkin's insurers were obligated to defend it in the Board's suit. *Id.* The Supreme Court granted Wilkin's insurers leave to appeal the appellate court's decision and on May 20, 1991, the Illinois Supreme Court affirmed that decision. 144 Ill.2d 64, 578 N.E.2d 926 (1991).

When the Board learned in 1988 (with regard to the Price and Fenger schools) and in 1989 (from the AHERA surveys of its other schools) that it had suffered property damage at many of its schools in excess of the deductible, the Board was aware both that the Illinois Supreme Court had granted leave to appeal in the Board's suit against the manufacturers and that on appeal in the appellate court was Wilkin's appeal of the ruling for the insurers in its case. The Board anticipated that a claim on its property policy would almost certainly result in the cancellation of its coverage by AFM. The Board also anticipated that prosecution of a claim would mean substantial legal expense, since it anticipated that AFM would vigorously resist payment.

Because the issue of whether asbestos-related losses constituted property damage was squarely at issue in both appeals, the Board determined to await the resolution of both its litigation in the Illinois Supreme Court and the *Wilkin* litigation before determining whether to file a claim on its policies. *Id.* at ¶7. The Supreme Court granted Wilkin's insurers leave to appeal the appellate court's decision and on May 20, 1991, the Illinois Supreme Court affirmed that decision. 144 Ill. 2d 64, 578 N.E.2d 926 (1991).

In light of the development in *Wilkin* and *Bd. of Ed.* in late 1989, the Board engaged counsel to investigate whether it should file a claim on its policies against AFM. After thorough review of the policies and the factual underpinning of its claim, the Board determined to make a claim, which it filed on September 4, 1990. Less than two months later, on October 17, 1990, AFM summarily denied the claim and instituted this action. AFM simultaneously instituted this action seeking a declaration that the costs incurred by the Board in removing and abating asbestos from its facilities are not covered under any of the four property damage policies issued by AFM to the Board. Some seven weeks later, it cancelled the Board's property coverage. The Board claims that AFM should indemnify it for its asbestos removal and maintenance costs under the four insurance policies.

DISCUSSION

A moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In determining whether there are any genuine issues of material fact, we draw all inferences in the light most favorable to the nonmovant." *Bartman v. Allis-Chalmers Corp.*, 799 F.2d 311, 312 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1304 (1987). However, only reasonable inferences will be drawn from the facts. *Spring v. Sheboygan Area School Dist.*, 865 F.2d 883, 886 (7th Cir. 1989). One of the principal purposes of summary judgment is to isolate and dispose of factually unsupported claims or defenses, and the rule should be interpreted in a way that allows it to accomplish this purpose. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). The Court's proper inquiry is "whether there is a need for a trial, whether, in other words, there are any genuine factual issues that can be properly resolved only by a finder because they may reasonably be resolved in favor of either party." *Anderson v.*

Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). Summary judgment is appropriate in statute of limitations cases, "since that defense often does not involve a genuine question of material fact." *Miller v. A.H. Robins Company, Inc.*, 766 F.2d 1102, 1107 (7th Cir. 1985).

THE FORTUITY DOCTRINE DOES NOT EXCLUDE THE BOARD'S LOSS

AFM bases its first argument on the principle that insurance contracts afford coverage only for events that are contingent or uncertain, not for losses that are already known to have taken or be taking place. AFM claims that the policies at issue insure "all risks of direct physical loss" occurring during each policy period, except those risks and losses excluded. Thus, the policies cover risks, not certainties. For a premium, AFM states, it assumed the risk that the Board's property could be physically damaged during the policy period. If the prospect of damage was not dependent upon chance, but rather, was inevitable, the basis for the insurance was destroyed.

In particular, AFM argues that if the Board's contention is accepted, that the presence of ACMs is direct physical loss under the policy and has caused direct physical loss under the policies, then the damage occurred upon installation during the years from 1946 to 1972 when ACM was first incorporated into the school buildings. In such case, there is no coverage because the damage would already have occurred prior to the inception date of the first AFM policy dated December 11, 1978. This policy stated that "The Company shall not be liable for any loss occurring prior to the inception date . . . of the policy."

AFM claims that even if the Board's contentions that the existing property damage was exacerbated during the AFM policy periods through release of asbestos fibers, its claims are still barred because (1) the loss was already in progress on the date coverage began; and (2) any future losses were a certainty rather than a risk,

on the inception date of each policy. As a result, there can be no dispute that the alleged release or loss was not fortuitous and therefore that the Board's claim is not covered.

AFM cites as its authority to support its argument that courts refuse to grant coverage under insurance policies for losses which have already begun at the time the policy coverage began. *Bartholomew v. Appalachian Ins. Co.*, 655 F.2d 27 (1st Cir. 1981); *Summer v. Harris*, 573 F.2d 869 (5th Cir. 1978); and *Appalachian Ins. Co. v. Liberty Mut. Ins. Co.*, 676 F.2d 56 (3d Cir. 1982). To determine whether the claimed losses were fortuitous, AFM argues that the court must examine both the inherent qualities of asbestos and the intended use of the structures into which it was incorporated as well as the Board's knowledge. Under this "loss-in-progress" doctrine, where a loss-causing event has already begun on the date the policy coverage begins, there is no coverage for the resulting damage. AFM maintains that the Board's claim is that the presence of ACM in school buildings constitutes property damage, and that the alleged release of fibers since installment until removal, or until the present was caused by various events and occurrences. AFM further argues if the release of asbestos fibers has been continual since installation, then the damage, as well as all the events and occurrences causing such damage, was occurring both prior to and on the date coverage under AFM's policy first incepted on December 11, 1978. Any losses for which the Board now claims coverage were indisputably "in progress" on that date. Accordingly, coverage does not exist under either the first AFM policy commencing December 1978 or under the three policies following it, commencing December 1981, 1984 and 1987.

AFM argues that the inherent qualities of asbestos combined with the intended use of the Board's school buildings made the damage inevitable and that the Board knew this. AFM points to several factors to illustrate the state of the Board's knowledge prior to inception of the first AFM policy:

(1) Discovery has revealed that the ACMs were installed during the period from 1946-1972, prior to the inception of the policies;

(2) The Board knew that the presence and release of asbestos was a potential health hazard because as early as 1973 the EPA addressed the issue of asbestos in buildings when the Toxic Substances Control Act banned the spraying of asbestos for fireproofing and insulation in new construction. That ban applied to the Board;

(3) In 1975, the EPA banned the use of asbestos in pipe covering and boiler lagging and that ban applied to the Board;

(4) In 1978, the EPA banned asbestos spraying in buildings for nearly all purposes and that ban applied to the Board;

(5) In March 1978, the EPA published a guidance document "Hazard Abatement From Sprayed Asbestos Containing Materials In Buildings." This booklet observed, "The recognition of the potential health hazards from exposure to asbestos fiber . . . has prompted the [EPA] . . . to enact regulations for its safe handling to protect the public, the environment and the worker . . . . Asbestos in all forms is considered a serious respiratory hazard . . . . Environmental contamination from [ACM] can occur not only during construction and demolition, but also throughout the life of the structure;"

(6) Even earlier, in 1971 and 1972 asbestos spraying was banned by the cities of Boston, Chicago, New York and Philadelphia, and the State of Illinois. Attorney General's Asbestos Liability Report to the Congress, November, 1981, p. 52; Amendment Hearings before the Subcommittee on the Environment, August 5, 1971, p. 127; Michael Knight, "Cities Are Acting to Regulate

Spraying of Asbestos," in *New York Times*, June 29, 1971, p. 61; Casey Bukro, "Illinois Votes Rules on Asbestos Uses," in *Chicago Tribune*, January 7, 1972, Sec. 1, p. 3. The 1971 Chicago ordinance was characterized as the most stringent, calling for up to six-month jail terms. *Knight, Op. Cit.* In addition, in October 1975 the EPA prepared a Report warning about the health effects of "contamination of building air" as a result of the past uses of asbestos in buildings;

(7) The report and study reported results from air sampling of selective buildings, including two buildings in Chicago. "Asbestos Contamination in the Air of Public Buildings," October 1, 1975;

(8) On August 18, 1978 Joseph Califano, then Secretary of HEW, wrote to the governor of each state urging that public health and school officials review the asbestos problem and determine "whether it is prudent to eliminate from schools and other public buildings potential sources of exposure to asbestos." Accompanying this letter was a report prepared by the Mount Sinai School of Medicine calling attention to a possible general problem nationwide, stating that friable asbestos was found to exist in schools across the country. One of the authors of this report, Dr. Robert Sawyer, was subsequently employed by the Chicago Board as a consultant to assess the asbestos hazard in Chicago schools;

(9) In November 1978, the cover article in the American School Board Journal was "Asbestos in Schools: Walls and Halls of Trouble," November, 1978, p. 31, which advised school administrators "asbestos may cause a rare incurable cancer, can be extremely dangerous and expensive to remove and is a problem that can be solved by astute school boards;"

(10) In March 1979, the EPA issued a guidance packet regarding asbestos abatement to public school districts throughout the country;

(11) The Board had begun to investigate the hazards posed by asbestos in school buildings by the summer of 1977. Significantly, as early as 1973, a Chicago area school was closed because of suspected exposure to asbestos contaminants. "Cancer in Youth Linked to Asbestos," in *Chicago Tribune*, March 22, 1973, p. 3;

(12) Similarly, while undertaking mechanical rehabilitations of its facilities in the 1970s, the Board specifically installed fiberglass when it became necessary to replace the existing insulation. Later, while undertaking school inspections for friable asbestos required by AHERA, inspectors noted that these conversions of the insulating materials eliminated the concern over asbestos. For example, in the AHERA for Lincoln Elementary School, the inspector noted, "Partial Abatement 1975 New Boilers and Some Piping F.G. Around Boilers and Bathrooms." Likewise, the AHERA for Vanderpool School notes, "Much of the pipe wrap was changed over to F.G. in 1974 with installations of the boilers;"

(13) Beginning in the summer of 1977 the Board began contacting asbestos testing firms to begin testing schools for the presence of dangerous levels of airborne asbestos contamination. In the summer of 1977, the Board met staff of the Illinois Institute of Technology, Research Institute ("IIT/RI"), one such contractor, to discuss testing of schools. On July 27, 1977, the Board wrote to IIT/RI: "The Bureau of Architecture of the Chicago Board of Education has identified schools, as listed in the paragraphs below, to be investigated to determine if, in fact, those ceilings or fireproofing of the structural steel emit asbestos fibers in the air and create an adverse effect or harmful

condition to the occupants of the school building." On June 28, IIT/RI personnel met with Board employees to discuss sampling and analysis of airborne asbestos concentrations. On August 15, 1977, IIT/RI wrote to the Board summarizing the June 28 meeting which included a tour of affected locations;

(14) On December 4, 1978, IIT/RI submitted a proposal to measure airborne asbestos concentrations in three Chicago schools, in response to the Board's request of November 22, 1978. Thereafter, on December 20, 1978, the Board passed a resolution to determine the level of airborne asbestos fiber present in schools where this material was used in the construction process. This is a pilot project using representative schools in various locations of the City of Chicago;

(15) As a result of this pilot project, in March 1979 the Board was advised that a potential health hazard indeed existed. In an Industrial Hygiene Report prepared by the National Loss Control Service Corporation at the Board's request, it was recommended that the Board "remove any asbestos-containing ceiling which is in a state of deterioration. Such a ceiling can only release higher numbers of fibers with the passage of time and continued neglect. . . . ideally the entire ceiling should be removed as it can only continue to deteriorate thus increasing asbestos concentrations;"

(16) In its Answers to Interrogatories, the Board concedes that it "began doing bulk sample testing in 1979." Board employees took samples of asbestos containing materials which confirmed that friable asbestos was indeed present in these facilities. In 1979, "federal legislation mandated school systems to identify the facilities with asbestos containing material." The Board began a costly and time consuming asbestos removal and abatement

program and, in their own words, "established a program that exceeded federal legislation;"

(17) In 1980, the Board passed the following resolutions: (a) it closed three schools, and parts of two others, for asbestos abatement activity; (b) it placed 52 other schools in an Asbestos Abatement Management Program; (c) it adopted a separate budget classification for asbestos abatement and management expenses; and (d) it retained private contractors to train Board personnel in inspection and abatement procedures; and

(18) In a brief submitted to the Supreme Court of Illinois by the Board on April 27, 1989, at pp. 18, 19, the Board admits that breakdown and release of asbestos fibers in inevitable, indeed, is not fortuitous.

AFM argues in light of these numerous facts, that the Board was aware of the inevitability of the losses it now claims before the first contract of insurance took effect.

In response the Board denies that it had knowledge of any losses in excess of the deductible prior to the inception of the policies. The Board contends that AFM's argument turns on a factual determination of what the Board knew when it purchased the policies. Further, the Board argues that, at this juncture, this court must accept the Board's version of the facts and deny summary judgment.

In support of this response, the Board points out that the origin of the fortuity doctrine marks an attempt by underwriters to avoid insuring a loss that in hindsight was objectively certain to occur whether or not it could be known in advance. The Board argues that the modern trend in Illinois has rejected this position, and instead has limited the doctrine to situations where not only is the loss certain to occur, but also that the insured in fact knew before the policy was purchased that the loss would or had occurred.

In the alternative, the Board argues that even if all three of AFM's factual assertions (a) that it had ACM in its buildings, (b) that it knew that the asbestos in its buildings constituted, in its words, "a potential health hazard," and (c) that asbestos is released through natural deterioration and through the intended and normal use of the school buildings, AFM's argument is fallacious in at least two respects. First, even if all three of these facts were true, the losses here would still be fortuitous. Even if the Board knew before December 1978 that it had asbestos in its buildings and that this constituted a potential health hazard, that is like saying that an owner of a wooden building knows that it might catch fire. Coverage is not excluded simply because the insured is aware of the possibility of loss. Indeed, that is the reason that he or she purchases insurance. Rather, fortuity is lacking only when the parties *know* that the loss either has or during the policy term will occur, a state of knowledge that AFM does not even allege the Board has. Second, the Board in fact before the 1978 policy was issued did not know that its asbestos in place was even potentially dangerous.

As to the applicability of this fortuitous doctrine, the start of our discussion focuses first on Illinois law and the case of *Harbor House Condo Assn. v. Mass. Bay Ins. Co.*, 703 F. Supp. 1313 (N.D. Ill. 1988), *aff'd*, 915 F.2d 316 (7th Cir. 1990). In *Harbor House*, a condominium association sought to recover under a Massachusetts Bay all-risk casualty policy the replacement costs of a perimeter heating system which allegedly suffered damage as a result of freezing. On the insurer's motion for summary judgment, the court held that the condominium association was not entitled to recover under the policy, as it had not shown that damage to the entire system was caused by freezing and failed to establish the extent of damage to the entire system.

The court in addressing the issue of coverage and the fortuity doctrine noted as follows:

> Coverage under an "all risk" insurance policy extends only to a loss caused by a fortuitous event. *Mattis v. State Farm Fire & Casualty Co.*, 118 Ill. App. 3d 612, 621, 73 Ill. Dec. 907, 914, 454 N.E.2d 1156, 1163 (5th Dist. 1983). The insured must prove both that a loss occurred and the loss was a result of a fortuitous event. *Texas Eastern Transmission v. Marine Office-Appleton & Cox Corp.*, 579 F.2d 561, 564 (10th Cir. 1978). In order to withstand a defendant's motion for summary judgment, the plaintiff must present sufficient evidence as to each of these two elements to permit a reasonable jury to return a verdict in the plaintiff's favor. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986).
>
> Although it is not clear that the pipes sustained any further damage, defendant does not dispute the existence of any such further damage for purposes of this motion. A dispute does exist, however, with respect to the cause of that damage. Unlike a plaintiff who asserts a loss under a "specific risk" policy, a plaintiff claiming damage under an "all risk" policy need not prove the exact cause of damage. *Morrison Grain Co.*, 632 F.2d 424, 430 (5th Cir. 1980). However, the plaintiff must establish that the loss occurred as a result of a fortuitous event. *Morrison Grain*, 632 F.2d at 430-31; *Texas Eastern Transmission v. Marine Office-Appleton & Cox Corp.*, 579 F.2d 561, 564 (10th Cir. 1978); *Standard Structural Steel Co. v. Bethlehem Steel Corp.*, 597 F. Supp. 164, 193 (D. Conn. 1984).

Harbor House at 1316-17.

A fortuitous event was defined in a footnote as "an event which so far as the parties to the contract are aware, is dependent on chance. It may be beyond the power of any human being to bring the event to pass; it may be within the control of third persons; it may even be a past event provided that the fact is unknown to the

parties." *Mattis v. State Farm & Casualty Co.*, 118 Ill. App. 3d 612, 623, 73 Ill. Dec. 907, 915, 454 N.E.2d 1156, 1164 (5th Dist. 1983) (quoting Restatement of Contracts, § 291 Comment a (1932)). Damage due to causes such as known pre-existing problems would not be fortuitous. *Id.*

The Board claims that the modern trend in Illinois and elsewhere has rejected the position that known risks are excluded from insurance coverage and instead has limited the doctrine to situations where not only is the loss certain to occur, but also that the insured in fact knew before the policy was purchased that the loss would-or had occurred. *See, e.g., Mattis v. State Farm Fire & Cas. Co.*, 118 Ill. App. 3d 612, 454 N.E.2d 1156 (5th Dist. 1983); *Standard Structural Steel v. Bethlehem Steel Co.*, 597 F. Supp. 164 (D. Conn. 1984). This modern approach, the Board claims, is an adoption of the Restatement of Contracts definition of fortuity which was cited in *Harbor House.*

Harbor House, although instructive as to the concept of this doctrine, is of little help as to the dimensions of this doctrine, especially with regard to a latent type of injury such as asbestos. Neither party cites Illinois law, as to such, so we must now turn to persuasive authority outside of Illinois. The dimensions of this known risk doctrine, however, were extensively discussed in *City of Johnstown, New York v. Bankers Standard Insurance Company*, 877 F.2d 1146 (2d Cir. 1989). Like the present case, the *City of Johnstown* involved a coverage dispute. There, in the underlying CERCLA suit, the State of New York had sued the City for the costs of cleaning up certain wastes that seeped from a city landfill into surrounding grounds. Evidence had emerged, from the previous fifteen years, indicating that certain wastes leaking from the landfill may have polluted those groundwaters. 877 F.2d at 1147. In light of this evidence, in the declaratory judgment action bought by the City seeking coverage, the insurers had argued first that the policies specifically excluded losses or damages "expected" or "intended" by the City. The insurers argued that, in light of the

earlier warnings of contamination, the alleged environmental damage that underlay the CERCLA suit was certainly expected by the City, and thus not covered by the insurer's policies. Second, the City knew of the contamination before the contamination was a "known risk," and that thus the policies did not cover any liability resulting from that contamination.

The Second Circuit denied the insurer's motion for summary judgment and rejected this "known risk" doctrine. The court, after noting that the insurers had essentially merged the two arguments at the district court level, discussed both doctrines in detail. Observing that no New York cases discussed the doctrine of known risk, the court stated as follows:

> We do not agree that the cases offered by appellees stand for the proposition that knowledge of a risk makes that risk uninsurable. As we perceive it, some of the cases cited stand for the principle that insurance cannot be purchased for damage deliberately done before the inception of insurance, *see Bartholomew v. Appalachian Ins. Co.*, 655 F.2d 27, 28-29 (1st Cir. 1981), or for damage that has been fraudulently concealed from the insurer prior to the purchase of the insurance policy, *see Arley v. United Pac. Ins. Co.*, 379 F.2d 183, 187-88 (9th Cir. 1967), *cert. denied*, 390 U.S. 950, 88 S. Ct. 1039, 19 L. Ed. 2d 1140 (1968). Other cases cited stand for the proposition--inapposite here--that property cannot be insured if it is rapidly being destroyed, *e.g.*, as in a flood, *see, e.g., Mason Drug Co. v. Harris*, 597 F.2d 886, 887-88 (5th Cir. 1979), or for the proposition that insurance will not normally cover damages that are, as a result of legal or administrative proceedings, already apparent at the inception of insurance, *see, e.g., Appalachian Ins. Co. v. Liberty Mut. Ins. Co.*, 676 F.2d 56, 62-63 (3d Cir. 1982); *Town of Gloucester v. Maryland Casualty Co.*, 668 F. Supp. 394, 402 & n.2 (D.N.J. 1987); *United States v.*

Maryland Casualty Co., 653 F. Supp. 152, 181 (W.D. Mo. 1988). Finally, other cases cited deal with doctrine regarding damages that are "expected" or "intended" by the insured, *see, e.g., New Castle County v. Hartford Accid. & Indem. Co.*, 685 F. Supp. 1321, 1329-30 (D. Del. 1988) a topic that was more fully discussed above.

We recognize that, as a basic rule, recovery cannot be had on property that the insured knew was already destroyed at the inception of insurance. *See Hanover Fire Ins. Co. v. Morse Dry Dock & Repair Co.*, 152 Misc. 111, 116, 272 N.Y.S. 792, 799-800 (Sup. Ct. N.Y. County 1934), *aff'd*, 244 A.D. 780, 280 N.Y.S. 795 (1st Dep't 1935), *aff'd*, 270 N.Y. 86, 200 N.E 589 (1936). We also recognize as a basic rule, recovery is similarly barred if the insured fraudulently concealed from or misrepresented a material fact to the insurer at the time the policy was issued, and that this would include situations where the insured concealed that the damages for which recovery is sought had occurred prior to the inception of the policy. *Jonari Management Corp. v. St. Paul Fire & Marine Ins. Co.*, 58 N.Y. 2d 408, 416-17, 448 N.E.2d 427, 431, 461 N.Y.S. 2d 760, 764 (1983); N.Y. Ins. Law 3105 (McKinney 1985).

However, the instant case is not one where any such fraudulent misrepresentation or concealment has been charged. On their motion for summary judgment, the insurers did not attempt to avoid coverage on the ground that the policies, by their own terms, were void because the City had fraudulently misrepresented or concealed a material fact at the inception of the contract of insurance. Instead, the insurers argued that the damages alleged in the CERCLA action were a "known risk," and that hence the City was entitled to no coverage. However, appellees have failed to cite support in New York law for this broader proposition that a risk, once "known," is uninsurable; nor have we found any such case law.

877 F.2d 1146, 1153.

The court, after noting the absence of supporting New York law, found no support for the proposition that a risk, once "known," is uninsurable. *Id.* As in *Johnstown*, AFM has failed to cite Illinois law which stands for the proposition that a risk, once "known," is uninsurable.

In *U.S. Fire Ins. Co. v. CNA Ins. Companies*, 213 Ill. App. 3d 568, 572 N.E.2d 1124 (1st Dist. 1991), at the time of the inception of two policies, a manufacturer knew that its product, Maleface--sold in sheets and cut into component parts for kitchen cabinets--was defective and would deteriorate in time. *Id.* at 1129-30. Nevertheless, the court found, under Wisconsin law, that the exact extent of the property damage was too speculative for the insured to have intended or expected such damage. *Id.* at 1130. More than mere foreseeability, the court said, is required. *Id.* The inability of the manufacturer to control the progressive deterioration of its product when placed in cabinets enabled the court to distinguish *Appalachian Ins. Co.* and *Bartholomew*. More than that, in *U.S. Fire Ins. Co.*, the manufacturer knew it had manufactured a defective product.

Viewing the record in a light most favorable to the Board, I find that the undisputed facts reveal that a genuine issue of material fact remains as to the Board's knowledge of loss. AFM argues that various government pronouncements, by the 1970s and 1980s had made the danger of asbestos in building materials clear and as a result of such the Board was on notice with regard to the potential hazards of asbestos in its schools. Nevertheless, the EPA documents did not immediately require removal or abatement of asbestos-containing materials in the schools. In fact, Congress in 1986 found "As a result of the lack of regulatory guidance from the Environmental Protection Agency, some schools have not undertaken response action while many others have undertaken expensive projects without knowing their action is necessary, adequate or safe." *See* 15 U.S.C. § 2641(a)(1).

Nor does the fact that fiberglass was used to replace the existing insulation at Lincoln Elementary School, or that beginning in the summer of 1977 the Board began contacting asbestos testing firms to begin testing its schools, or the Board's December 20, 1978 resolution to initiate a pilot project to test airborne fibers present in the schools change this conclusion. As the Board points out in the affidavit of James Harney, the Board, by December of 1978, had not conducted an inventory or otherwise taken steps to identify buildings with asbestos. Indeed, given the age of many of the Board's buildings, the state of the Board's records, and the sheer number of facilities, this proved to be a daunting task, which was not completed until May, 1989.[27] Rather, in March, 1979, as a result of the pilot program to test six buildings for the presence of airborne asbestos fibers, the Board received its first report regarding the levels of asbestos in its buildings.[28] The report advised that no dangerous levels of airborne fibers were found in any of the three buildings analyzed.[29] On June 8, 1979, the Board received a second report.[30] The report found no airborne fibers at two of the three buildings inspected and airborne fibers "well below the current OSHA standards . . . and recommended NIOSH limits" at the third school.[31] Finally, the argument that the Board raised in its brief submitted to the Illinois Supreme Court in *Board of Education of the City of Chicago v. A, C, and S, Inc.*, and the fact that the Board had spent over 9.0 million dollars for abatement by December 1984 does not serve as an admission of knowledge on the Board's part. To be sure, the Board had knowledge of the

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[27] Affidavit of Daniel J. Kohnen, par. 3.

[28] AFM's Ex. Q.

[29] Id.

[30] Ex. 16.

[31] Id.

risk asbestos presented but this knowledge was speculative. How could the Board know which buildings would require abatement or the amounts of liability to be imposed until it received the results of its testing program? The Board has also shown that AFM knew of the danger that asbestos presented in the Board's buildings, yet issued policies without any asbestos exclusion. This shows that AFM had almost as much knowledge as the Board had. The court in *U.S. Fire Ins. Co. v. CNA, Ins. Companies*, 213 Ill. App. 3d 568, 572 N.E.2d at 1131 (1st Dist. 1991), considered the insurer's knowledge of problems that insured had with its product in finding coverage. 572 N.E.2d at 1131. The court stated as follows: "If the insurer wished to exclude the risk of further liability it should have acted to specifically exclude it, rather than simply relying on a court's construction of the term 'expected.'" *Id.* In the present case, AFM should have acted to exclude coverage for asbestos related claims. Therefore, I agree with the Board that this argument of fortuity turns on a question of fact as to when the Board first had knowledge that the asbestos reached contamination levels prohibited by law. Thus, a genuine issue of fact remains as to the Board's knowledge at the inception of coverage.

AFM'S ONE YEAR STATUTE OF LIMITATIONS COULD BAR THE BOARD'S CLAIM IF THE DOCTRINE OF MUNICIPAL IMMUNITY IS FOUND NOT TO APPLY

Next, AFM contends that AFM is entitled to summary judgment because the Board breached AFM's policy requirements by failing to give immediate written notice of loss, and failing to file suit within twelve months after the inception of the loss. AFM maintains that the Board's failure to give any notice of the claim for over twelve years after it was aware of the facts which constitute the claim mandates that coverage be denied under *U.S. Fid. & Guar. Co. v. Maren Engineering Corp.*, 82 Ill. App. 3d 894, 898, 403 N.E.2d 508, 511 (1st Dist. 1980). This notice requirement AFM contends is a condition precedent to recovery. AFM claims

that the Board's duty to give notice arose on the first day of the first policy period in December 1978.

AFM also argues that Illinois courts have consistently adopted the position that the applicable limitations period commences at the inception of loss, not the date of discovery of the covered loss and not when the insured appreciates the significance of a loss as a potential claim. AFM claims that "It is the occurrence of some . . . cognizable event rather than knowledge of its legal significance that starts the running of the statute of limitations." *McGee v. Weinberg*, 97 Cal. App. 3d 798, 804, 159 Cal. Rptr. 86, 90 (1979). Therefore, AFM argues it is as irrelevant to the one-year commencement of suit provision, as it is to the accrual of a cause of action "that the defendant is ignorant of his legal remedy or the legal theories underlying his cause of action." *Gutierrez v. Mofid*, 39 Cal. 3d 892, 218 Cal. Rptr. 313, 316, 705 P.2d 886, 890 (1985) (*en banc*) rehearing denied; *Lawrence v. Western Mut. Ins. Co.*, 204 Cal. App. 3d 565, 574, 251 Cal. Rptr. 319, 323 (1988).

If the ascertainment of alleged damage marks the inception of the loss in this case, such inception was, at the very latest, in 1980-1981 when the Board "established a formal asbestos abatement program" through Board action in August 1980, funded that program, and "identified 90 schools containing asbestos materials potentially hazardous to health." Hence, the latest date that the Board's duty to give notice and file suit was triggered in 1982-1983 when it abated and removed almost a million square feet of asbestos materials, completed abatement of 82 schools, and expended $2.7 million on asbestos abatement. Instead, the Board waited eleven years after it established its asbestos abatement program to comply with AFM's requirements.

In response, the Board states that if any limitation provision was applicable here, it was complied with. The Board claims that as soon as it had knowledge under Illinois law it gave notice to the Board via its claim letter of September 4, 1990. The Board counters that as a public body the Board enjoys Illinois municipality

immunity and is exempt from AFM's limitations provisions. The Board also argues that the limitations provisions at issue here are far from uniform thus raising a question of ambiguity and a disputed question of material fact.

The Board points out that in its 1978 policy, suit was to be commenced within one year "next after inception of the loss." The 1983 policy did not incorporate the standard fire policy form, using instead AFM's own Form 2293, Special Policy Conditions. Here, the suit limitations period begins to run "after discovery by the insured of the occurrence which gives rise to the claim." Further, Form 2293 provides in provision 23 that the "[t]erms of the policy which are in conflict with the statutes of the state wherein this Policy is at issue are hereby amended to conform to such statute." The 1985 policy also contained the same Special Policy Conditions Form 2293, with its discovery standard. The 1985 policy, however, contained Form APP-1, which had a different suit limitations provision. This provision stated that suit is to be commenced with 12 months "after the happening of the loss, unless a larger period of time is preserved by applicable statute." Finally, the 1988 policy has only the APP-1 limitations provision.

The Board argues that it did not discover it had a covered claim until December 1989 and it filed its claim nine months later, in September 1990. The Board states that AFM's argument that Illinois has not adopted a discovery standard for the suit filing requirement is both incorrect and irrelevant.

In any event, the Board argues that it is immune from AFM's limitations bar because in *Board of Education v. A, C, and S*, 131 Ill. 2d 428, 546 N.E.2d 580 (1989) the Illinois Supreme Court ruled that with respect to its efforts to recoup the costs of the asbestos abatement activities the Board and the 33 other school district plaintiffs were immune from the contractual limitations.

Finally, the Board argues that AFM's 1981, 1984 and 1987 policies acknowledge, that their limitation provisions are valid only

so far as not inconsistent with Illinois law. Here, Illinois' usual 10-year limitation period for suit on a contract, Ill. Rev. Stat., ch. 110, ¶ 13-26 (1984), has been superseded by the Illinois Insurance Code and its delegation to the Illinois Director of Insurance the authority to set terms of insurance policies, including limitations. Ill. Rev. Stat., ch. 73, ¶ 1013. However, Illinois courts have recognized that these agency-set limitations provisions do not affect general immunities provisions from limitations statutes. For example, the two-year suit limitations provision in standard auto policies is held tolled by the Illinois statutory provision immunizing minors and others under disability from suit limitations.

In reply, AFM argues that each policy gave the Board 12 months to institute suit. Whether the 12 months runs from the "inception of the loss" (Policy No. A4721), "discovery by the insured of the occurrence which gives rise to the claim" (Policy No. F6599), or "the happening of the loss" (Policy Nos. I6227, EA412), it was breached, barring the Board's claim as a matter of law. AFM points out that the Board concedes it discovered the loss by May, 1988. Bd.'s Facts No. 39, 46, Bd.'s Brf. 7, 8, 19. AFM also argues that Illinois law could not be more clear that the occurrence of a loss, rather than discovery, triggers the commencement of the limitations period. *Sager Glove Corporation v. Aetna Ins. Co.*, 317 F.2d 439, 441 (7th Cir. 1963).

AFM similarly argues that Illinois law is equally clear that the "loss," not appreciation of a "covered claim," triggers the limitations period. *Naghten v. Maryland Casualty Co.*, 47 Ill. App. 2d 74, 197 N.E.2d 489 (1st Dist. 1964). Taking the most liberal interpretation of the "loss," and even granting the Board a discovery standard, this suit is barred by the 12-month suit limitations period, since the 12 months began to run at the latest in May 1988, when the Board claims it first learned of costs above the deductible at two schools, and expired in May 1989, well before it ever asserted a claim against AFM. Any suit is barred under the 1978, 1981 and 1984 policies. Quite simply, any occurrence would have to take

place during those policy periods. The necessary implication of the Board's argument that reaching the deductible triggers the occurrence, notice and suit limitations provisions, is that the Board had no claims under the 1978, 1981 and 1984 policies since there was no occurrence until May, 1988. The latest date for a covered "occurrence" on those policies would be the last day of coverage under each. As a matter of law, suit would have to be filed within one year from the terminations of the policies to comply with the limitations provisions.

AFM argues that the Board's argument that it first discovered a "covered claim" in December 1989 after the *Wilkin* decision is legally unfounded under *Naghten* as well as factually unsupported, since the Board took the position in 1985 that the presence of ACMs constituted property damage and that the costs of remediation would be substantial. Similarly, in 1985 the Board filed a claim with the Johns-Manville Trust as a property damage claimant. Even if the Board was waiting for an Illinois appellate court to endorse its legal theory, that occurred in June 1988, when an appellate decision in the Board's favor was issued, in the *A, C, and S* case.

Finally, AFM argues that the Board is not immune from AFM's contractual limitations provisions. The Board's analogy to common-law municipal immunity from statutes of limitations is erroneous, it is urged, because here AFM seeks to enforce contractual provisions to which the Board voluntarily assented.

This second argument requires resolution of when the Board's cause of action accrued and whether the Board's notice to AFM was reasonable. If the facts reveal that the statute of limitations did in fact lapse we must determine whether the Board is exempt from this contractual bar under the doctrine of municipal immunity.

The general rule in Illinois for triggering of the statute of limitations is that it "begins to run when facts exist which authorize bringing of an action." *Kozasa v. Guardian Electric Mfg. Co.*,

99 Ill. App. 3d 669, 673, 425 N.E.2d 1137, 1141 (1st Dist. 1981) (quoting *Meeker v. Summers*, 70 Ill. App. 3d 528, 529, 388 N.E.2d 920, 921 (5th Dist. 1979)). However, in asbestos cases, courts usually apply a more lenient rule for the triggering of the statute of limitations -- "the discovery rule." Under this rule, the statute of limitations accrues when a plaintiff knew or should have known of his injury and its cause. *See Knox College v. Celotex Corporation*, 88 Ill. 2d 407, 415, 430 N.E.2d 976, 979 (1982); and *Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161, 167, 421 N.E.2d 864, 867 (1981). Thus, we must first determine when the Board knew or should have reasonably known of its injury and its cause. To resolve this issue we must have some idea as to what constitutes a sufficient cause of action.

In Illinois there are two key cases which establish what constitutes a sufficient cause of action for an asbestos property damage action. In *Board of Education of City of Chicago v. A, C, and S, Inc.*, 131 Ill. 2d 428, 445, 546 N.E.2d 580, 590 (1989), the complaint alleged that friable asbestos existed in the plaintiff's buildings and asbestos had been released throughout the schools. The court stated that since it was ruling on a motion to dismiss for which it would take as true the facts alleged in the complaints -- it did not have to determine whether the amounts of friable asbestos in the buildings were harmful. What the court did hold is that "asbestos fibers may contaminate a building sufficiently to allege damage to property." 546 N.E.2d at 588. This statement suggests that there may be situations in which a plaintiff does not sufficiently allege damage to his property even though he knows asbestos is present. The court noted that "[t]he dangerousness which creates a risk of harm is insufficient standing alone to award damages in either strict products liability or negligence." *Id.* at 587. Furthermore, the court pointed out that in nonoccupational settings (i.e., places where asbestos is not manufactured, but where there is asbestos in the building), low-level asbestos exposure was not necessarily indicative of a tort cause of action. *Id.*

A second Illinois case, *United States Fidelity & Guaranty Company v. Wilkin Insulation Company*, 144 Ill. 2d 64, 578 N.E.2d 926 (1991), makes it clear that the statute of limitations period would not have started accruing until asbestos fibers which posed a serious health hazard had become known. The court reiterated what it had held earlier in *Board of Education*, "[t]his court has already found that asbestos fiber contamination constitutes physical injury to tangible property, i.e., the buildings and their contents." The facts of that case specified that the buildings and their contents (e.g., carpets, upholstery, drapery, etc.) were contaminated with asbestos fibers which posed a serious health hazard to the occupants. In the present case there was only a presence of asbestos in the warehouse in 1980, not an asbestos contamination of the building and its contents.

In *Kansas City v. W.R. Grace & Co.*, 778 S.W.2d 264 (Mo. Ct. App. 1989), appeal after remand 1992 WL 212510, Gen Fed Library (Mo. Ct. App.), the court reversed the trial court's grant of summary judgment to the defendant on the issue of the statute of limitations and found that a genuine issue of material fact existed as to when the statute of limitations began to run on the city's negligence and strict liability claims against manufacturers of the building product containing asbestos. Neither the plaintiff's knowledge of an OSHA report reflecting that the concentration of asbestos fibers did not exceed the limits permissible under federal guidelines nor a report establishing that asbestos was present caused an accrual of Kansas City's cause of action.

Finally, the Tenth Circuit Court of Appeals has recently held that the presence of asbestos and release of asbestos within the range considered safe by OSHA does not give a building owner a tort cause of action against a manufacturer. *Adams-Arapaho School District No. 28-J v. United States Gypsum Company*, 959 F.2d 868, 874 (10th Cir. 1992). In this case the School District presented no evidence of surface contamination and admitted it did not remove asbestos-containing materials which were in good condition. The

defendant was granted a directed verdict because plaintiff provided insufficient evidence of physical injury to send its strict liability and negligence claims to the jury. The key triggering event, therefore, is when the parties became reasonably aware that the asbestos had reached a level of contamination.

Taking the facts most favorable to the Board, it is undisputed that the review conducted pursuant to AHERA and completed in May, 1989, gave the Board a comprehensive summary of the levels of ACMs contained in its school buildings. This May of 1989 date is really giving the Board the benefit of the doubt because a true question of fact remains as the Board's knowledge with respect to the work done at the Fenger and Price schools. It is not clear that the abatement done at these schools was because the buildings had dangerous levels of contamination which exceeded regulatory guidelines. What AFM has failed to establish is precisely when the Board had knowledge that its buildings had asbestos which reached dangerous levels. It is beyond doubt, however, at the very latest that the Board had to know this by May of 1989 when its AHERA report was completed. Thus, the limitations period for filing suit could have elapsed in June of 1990 if a jury were to find that the Board was unreasonable in waiting until September of 1990 to even submit its claim letter. I agree with AFM, however, that the limitations period should not be tolled by the fact that the Board was waiting for a decision in *Board of Education v. A, C, and S*, and *Wilkin*. If this legally unsupported argument was accepted by this court any plaintiff could simply allege ignorance of his or her legal rights against a particular defendant. Thus, a genuine issue of fact remains as to whether the Board gave AFM reasonable notice and violated the limitations provisions of the contracts.

As to this issue of immunity, I am recommending that the Board be found immune from AFM's contractual limitation. Traditionally, AFM has argued, municipalities do not enjoy immunity when they contractually agree to be bound by a specific limitations period. As the court stated in *City of Chicago v.*

United States Fire Insurance Co., 124 Ill. App. 2d 340, 344, 260 N.E.2d 276, 278 (1st Dist. 1970):

> "We do not find any principles of law in these decisions which hold that a city is not bound by its legitimate contracts which are freely and properly made and which do not violate public policy. If cities are not to be bound by such contracts for reasons of public policy, such decisions must be made by the people acting through their state legislature and not through the courts. Presumably, municipalities could be prohibited from entering into insurance contracts which require them to give notice of accidents or lawsuits and it could be established as a condition of doing insurance business with municipalities that such clauses not be used. Such, however, is not the law of this state and was not the law at the time the insurance contract in question was entered into. The principle that a municipality must comply with its contractual obligations has repeatedly been asserted by the highest court of this State and must here again be recognized and affirmed." In *Wall v. Chicago Park District*, 378 Ill. 81, 37 N.E.2d 752, our Supreme Court said at page 93, 37 N.E.2d at page 758: "Neither these authorities, nor those from other jurisdictions relied upon by defendant, purport to hold that a governmental body is under no obligation to perform its contracts. On the contrary, the rule is well established that a municipal corporation, so far as the performance of its contracts is concerned, and unless its charter clearly provides to the contrary, must abide by its contractual obligations. *Chalstran v. Board of Education*, 244 Ill. 470, 91 N.E.2d 712; *City of Quincy v. Bull*, 106 Ill. 337."

However, in *The City of Shelbyville v. Shelbyville Restorium, Inc.*, 96 Ill. 2d 457, 451 N.E.2d 874, 876 (1983), the Illinois Supreme Court recognized that the doctrine of sovereign immunity is supported by the policy judgment that the public should not suffer as a result of the negligence of its officers and agents in failing to

promptly assert causes of actions which belong to the public. 96 Ill. 2d at 461, 451 N.E.2d 874. The purpose of the doctrines, of government immunity and sovereign immunity, as we understand them, is different: the former is designed to preserve public rights when the government is slow to assert them on the public's behalf, while the latter is used to promote the autonomy of public bodies as entities by insulating them from liability for their actions. *Id.*

More recently, in *The Board of Education of City of Chicago v. A, C, and S, Inc.*, 131 Ill. 2d 428, 429, 546 N.E.2d 580, 599 (1989), numerous school districts had brought suit against various suppliers of asbestos containing materials under the theories of strict liability, negligent misrepresentation, fraudulent misrepresentation and the Illinois Consumer Fraud Act. The court determined that the Board of Education was not barred from pursuing its cause of action because the right the Board of Education was attempting to assert, liability against the suppliers of asbestos materials, was a right belonging to the general public. The court in analyzing the effect of Ill. Rev. Stat. 1987, ch. 110, par. 13-214, concluded that the fact that section 13-213 excepts regulatory agencies acting pursuant to statute cannot be construed to mean that all governmental bodies are expressly included with the limitations set forth in section 13-213 for products liability actions. The court stated as follows:

> "In the absence of a more specific manifestation of legislative intent, we refuse to read the statute so as to remove the common law immunity of these government entities. We cannot ignore the resulting health concerns involved, and at trial the plaintiffs will have an opportunity to establish that the levels of asbestos in plaintiff's buildings can cause personal injury. The complaint also alleges that a costly program is underway to repair, replace, and maintain the ACMs. This complaint has alleged, therefore, an interest in the safety of the public buildings and in the safety of a large segment of this State's population which attends the public schools and for

> the children who will in the future attend these schools. There is also the interest of the parents, faculty, staff, and other people who use or will use our public school system. Moreover, unlike 'any other property owner,' these buildings are owned by the government, maintained with tax revenue, and used for mandatory classroom attendance as well as for other public functions."

546 N.E.2d at 601.

The court found that there was support for this conclusion that a public right is involved within the Asbestos Abatement Act which specifically states that "abatement, in view of the fact that the State of Illinois has compulsory attendance laws for children of school age and these children must be educated in the schools is of special concern to the General Assembly," Ill. Rev. Stat. 1985, ch. 122, par. 1402(d). *Id.* The court then went on to conclude that the districts did not have an implied private cause of action under the Asbestos Abatement Act but were entitled to common-law immunity from the statutes of limitations defense on remaining claims.

As AFM has argued, however, *Shelbyville* and *A, C, and S*, both dealt with statute of limitations prescribed by Illinois statute rather than the contractual provisions that the parties had agreed would both control. AFM claims that *Village of Lake in the Hills v. Illinois Emcasco Insurance Company*, 153 Ill. App. 3d 815, 506 N.E.2d 681 (2d Dist. 1987), is to be followed because here, as in *Village of the Lake*, contractual terms to which the parties agreed govern the limitation put on bringing suit. Thus, this court is faced with an issue upon which the Illinois Supreme Court has not yet ruled. Certainly, there have been rulings with respect to contracts that municipalities have entered into, but none appear to have addressed an asbestos situation. We are therefore put in the position of predicting how the Illinois Supreme Court would rule on this issue. *Roberts v. Western-Southern Life Insurance Co.*, 568 F. Supp. 536 (N.D. Ill. 1983); *Kelly v. Stratton*, 552 F. Supp. 641, 643 (N.D. Ill. 1982).

AFM's argument that the Board consented to this one year period of limitations is well taken, and ordinarily the terms of the contract determine the rights of the parties. I believe, however, that an exception arises in an instance such as this one, where latent injuries of the type suffered as a result of exposure to asbestos is in question. This conclusion is supported by the reasoning applied in *A, C, and S*, where the court stated that they could not ignore the resulting health concerns involved and the interest in the safety of the public buildings and a large segment of this State's population which attends the public schools and for the children who will in the future attend these schools. The court also noted the interest of the parents, faculty, staff, and other people who use or will use the public school system. *A, C, and S*, at 601. Finally, the Illinois Supreme Courts recent decisions in *Wilkin* and *A, C, and S*, infer that the health concern resulting from contaminated asbestos is paramount to procedural concerns. Therefore, I am recommending that the doctrine of municipal immunity applies to the instant case and the Board is not barred by AFM's one year limitations period.

A GENUINE ISSUE OF FACT REMAINS AS TO THE EFFECT OF AFM'S EXCLUSIONS

AFM's third argument contends that the exclusions of contamination, deterioration, wear and tear, inherent vice, and faulty or defective materials, design or workmanship preclude recovery under AFM's policies. In response the Board raises four arguments. First, the Board claims that the Gen Re incident shows that AFM itself did not think its exclusions barred asbestos-related property damage. Second, the Board contends that even accepting AFM's claim that the exclusions it relies on are actually in the policy, there is coverage here under the multiple causation doctrine since a contributing cause of the loss is not excluded. Third, the Board argues that the debris removal clause is unaffected by the exclusions and in any event covers the loss. Finally, the Board claims that the exclusions are irrelevant.

This report and recommendation will not address the merits of AFM's argument as to the effect of any of AFM's policy exclusion provisions. For purposes of this motion, I agree with the Board's argument that the Gen Re incident raises an issue of material fact as to the coverage granted to the Board and the exclusions therein. In the case at bar extrinsic evidence has been introduced bearing upon the intention of the parties and the meaning or the terms of the policy. The rules governing the interpretation of insurance policies require the court to effectuate the intent of the parties. *State Farm Mutual Insurance Company v. Schmitt*, 94 Ill. App. 3d 1062, 1063, 419 N.E.2d 601, 603 (1st Dist. 1981). Where the terms of a policy are clear and unambiguous, its plain meaning will be given effect. *Zipf v. Allstate Insurance Company*, 54 Ill. App. 3d 103, 106, 369 N.E.2d 252, 255 (1st Dist. 1977). Where, however, a provision in an insurance policy is subject to more than one reasonable interpretation, it is ambiguous and should be construed in favor of the insured. *Kirk v. Financial Security Life Company*, 75 Ill. 2d 367, 371, 389 N.E.2d 144, 145 (1978). Ambiguous provisions in which an insurer seeks to limit its liability are construed most strongly against the insurer with the insurer having the obligation to show that the claims fall clearly within the exclusion. 419 N.E.2d at 602. Thus, exclusionary provisions are applied only where the terms are clear, definite, and explicit. *Id.*

There are basically two reasons underlying the rules set forth above (1) the insured's intent in purchasing an insurance policy is to obtain coverage and therefore any ambiguity jeopardizing such coverage should be consistent with the insured's intent, *id.*, and (2) the insurer is the drafter of the policy and could have drafted the ambiguous provision clearly and specifically. *Reis v. Aetna Casualty & Surety Company*, 69 Ill. App. 3d 777, 788, 387 N.E.2d 700, 708 (1st Dist. 1978). The construction of an insurance policy is generally a matter of law for the court, although in a case of ambiguity where words or terms are to be construed by extrinsic

evidence, the question is one for the fact-finder. *Kraemer Bros. Inc. v. U.S. Fire Ins. Co.*, 278 N.W.2d 857, 860 (1979).

As the Board has argued, in August of 1986 the principal reinsurer of the Board's policy was General Reinsurance Corporation. On August 6, 1986, Peter Maple, the AFM underwriter responsible for the Board's business, had lunch with John Frost, Assistant Vice President of Gen Re. At that lunch, Frost informed Maple that it would no longer be able to reinsure AFM's coverage of the Board unless the reinsurance contract between AFM and Gen Re was amended to exclude from Gen Re's reinsurance exposure loss or expenses incurred by the Board for (1) asbestos material removal, (2) increased costs of debris removal and repair occasioned by laws regulating asbestos materials, and (3) removal or modification of Board buildings because of governmental directives that because of asbestos material the buildings could no longer be used. Gen Re, according to Frost, insisted on the asbestos exclusion in its reinsurance agreement unless all the buildings under the policy were built after 1972 (when according to Gen Re sprayed-on asbestos was banned by the EPA), the insured school district verifies there is no asbestos in its buildings, or AFM retains at least 30% of the risk. Maple testified in his deposition that he sought advice from the home office of Gen Re. In response he received a memorandum dated September 12, 1986 from Ron Bonneau of Allendale's central underwriting staff. Bonneau stated that it was the "corporate position" that Gen Re should not be allowed to so limit its reinsurance obligations. As his reason, he noted that "we cannot allow gaps between the insurance we provide in our policy and the reinsurance ceded under this policy."

The Board asserts that the Gen Re argument, as well as the fact that AFM received several reports indicating that asbestos was contained in some of the buildings but repeatedly failed to add the asbestos exclusion when renewing the Board's policy, raised an ambiguity as to the coverage sold to the Board. Given these

disputed material facts I agree with the Board that summary judgment as to the effect of AFM's exclusions cannot be decided at this time. If the district court concludes that AFM's motion for summary judgment should be denied on the grounds of fortuity, notice and limitations then the Board's 56(f) motion as to the policy history behind the drafting of the policies should be granted. I agree with the Board that the drafting history of the policies will help determine whether AFM itself recognized that the various policy clauses were confusing. The Board should be entitled to this limited discovery before a ruling on the effect of the exclusions is ordered.

As to AFM's debris removal argument, I agree with AFM that asbestos does not fit within the definition of debris.[12] I therefore recommend that the district court adopt the plain, ordinary meaning of debris rather than to strain to find the term ambiguous so as to justify a liberal construction in favor of the Board. Further, the fact that AFM amended this provision in October of 1987 fails to raise a genuine issue of fact as to its meaning. The text of the provisions are straight-forward, unambiguous and not subject to more than one reading as the Board argues. All debris provisions required that the loss be covered by the policy and insured against. Thus, whether

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[12] Policy A4721 (December 11, 1978 - January 11, 1982) provided "This policy also covers expenses of debris removal remaining after any loss hereby insured against." Policy F6599 (January 11, 1982 - January 11, 1985) provided "This policy also covers expenses incurred in the removal of debris of the property covered hereunder occasioned by loss caused by any of the perils insured against in this policy." Policy I6227 (December 11, 1984 - 1987) provided "This policy covers the insured's expenses incurred in the removal of all debris of the property of the Insured hereunder which may be occasioned by loss or damage directly caused by any of the perils insured against in this policy." Policy EA412 (December 11, 1987-1990) provided that "this policy covers the insured's expenses incurred in the removal of all debris of the property of the Insured hereunder which may be occasioned by loss or damage directly caused by any of the perils insured against in this policy."

the removal of asbestos in its schools falls under this debris provision will be determined by whether it is a covered loss.

THE MULTIPLE CAUSATION DOCTRINE IS NOT APPLICABLE TO THE CASE AT BAR

The Board further maintains that there is coverage under the multiple causation doctrine. The Board submits that under Illinois law and the terms of AFM's policies, damage caused by an excluded cause is covered by the policy if there is a concurrent or contributing cause which is not excluded. As stated in *Mattis v. State Farm Fire & Cas. Co.*, 118 Ill. App. 3d 612, 619, 454 N.E.2d 1156, 1161 (5th Dist. 1983),

> Where a policy expressly insures against loss caused by one risk but excluded loss caused by another risk, coverage is extended to a loss caused by the insured risk even though the excluded risk is a contributory cause.

In *Mattis*, damage to the insured's home was caused by inadequate or improper design or construction, earth movement, and cracking and bulging of the wall. All but the first of these causes was explicitly excluded by the policy. Nonetheless, the Illinois court found there to be coverage because the non-excluded inadequate or improper design was an approximate and contributing cause of the loss. *Mattis*, 454 N.E.2d at 1161.

The net effect of the doctrine, the Board maintains is that the Illinois Supreme Court held that the Board's alleged injuries caused by defendants' wrongful conduct in manufacturing and selling these unreasonably dangerous products constituted property damage, cognizable as the torts of strict liability, negligence and negligent misrepresentation. *Board of Education v. A, C, and S, Inc.*, 131 Ill. 2d 428, 449, 546 N.E.2d 580, 590 (Ill. 1989). As there is no exclusion of losses caused by unreasonably dangerous products in the AFM policies, under the multiple causation doctrine there is no coverage even if the exclusions relied on by AFM were germane.

The Board maintains that none of this comes as any surprise to AFM and it clearly intended to provide coverage in a multiple causation situation. First, the Board argues the policies at issue themselves either explicitly or implicitly provide multiple causation coverage. Thus, both the 1978 and 1982 policies contained a related perils provision, in which AFM agrees that if one cause or loss is not excluded there will be coverage under the policy despite the existence of an excluded cause. These policies also contain a Consequential Damage provision which provides at least as broad coverage, since as long as there is a covered damage to the property, the policy will cover it no matter what other exclusions apply. Finally, the Board argues if AFM wanted to do so, it could have written limiting language into its policies to exclude the multiple causation doctrine. The Board cites Bragg, *Concurrent Causation and the Art of Policy Drafting: New Perils for Property Insurers, 20 Forum 385, 391 (1985);* Withers, *Proximate Cause and Multiple Causation in First-Party Insurance Cases, 20 Forum 256 (1985).*

In response, AFM argues that in *A, C and S*, the Supreme Court sustained the adequacy of the Board's tort action because the Board's complaint alleged that the defective product caused damage contamination to the Board's property. The nature of the defect and the existences of "property damage" -- contamination -- other than the product itself, took the Board's claim from the realm of contract into the realm of tort. The nature of the defect alleged was the propensity of asbestos in a readily releasable form to break down into friable particles which may cause a health hazard. *Id.* at 589. To call asbestos an "unreasonably dangerous product" and to denominate it a "peril" begs the question of what is the claimed physical event and whether that physical event is excluded by the policy. The unreasonable nature of the product is what both the Board and the Supreme Court relied on to assert property damage is nothing more than "inherent vice" by another name.

AFM similarly argues that asbestos or unreasonably dangerous products are not perils or events subject to the exclusion or to the multiple causation doctrine. They are property; *i.e.*, building materials; products like wood or steel or iron. They may contain a condition contributing to the occurrence of a loss, just as the presence of a wood frame in a home is not a peril. Asbestos containing property, just as other building materials, is covered under a property policy as long as the damage to the property is caused by a non-excluded peril and other policy prerequisites are met. AFM further maintains that the Board is attempting to transmute the property asbestos or unreasonably dangerous products into a peril via the very exclusions in the policy which preclude coverage.

As to the merits of the multiple causation doctrine I am recommending that the district court find that this doctrine is not applicable to the case at bar. At the outset, I am troubled by the fact that the Board is simply applying a new label to the ACM. This new label or name of dangerous product does not create a second proximate or concurrent cause. They are one and the same. This multiple causation doctrine was extensively discussed in *United States Fidelity & Guaranty Co. v. State Farm Mutual Automobile Insurance Co.* (USF&G I), 107 Ill. App. 3d 190, 192, 437 N.E.2d 663, 666 (1st Dist. 1982), and *United States Fidelity & Guaranty Co. v. State Farm Mutual Automobile Insurance Co.* (USF&G II), 152 Ill. App. 3d 46, 48, 504 N.E.2d 123 (1st Dist. 1987), *appeal denied*, 151 Ill. 2d 551, 511 N.E.2d 438 (1987) (collectively USF&G).

In these two connected cases, Happyland Day Care Center had purchased from USF&G insurance against claims "caused by an occurrence and arising out of the ownership, maintenance or use of the insured premises and all operations necessary or incidental to the business of the named insured conducted at or from the insured premises." *USF&G I*, 437 N.E.2d at 664-65. The insurance policy excluded claims "arising out of the ownership,

maintenance, operation, use, loading or unloading of any automobile or aircraft owned or operated by any person in the course of his employment by any insured." *Id.* at 665. While some of the children were being driven from the day care center to a dance class, a child was injured when she "fell from, was thrown from, or otherwise exited" the automobile. *Id.* USF&G brought a declaratory judgment action seeking to establish that it did not owe a defense or coverage to the day care center. The Illinois Appellate Court determined that the injury was caused by two independent, proximate causes: the negligence of the day care center to supervise the children and the negligence of the day care employees in operating the vehicle. The court then held:

> If a proximate cause of an injury is within the included coverage of an insurance policy, the included coverage is not voided because an additional proximate cause of the injury is a cause which is excluded under the policy. Thus, in order for an injury to be excluded from coverage under an insurance policy, the injury must have been caused solely by a proximate cause which is excluded under the policy.

USF&G II, 504 N.E.2d at 125. Because USF&G could not prove that the automobile-related negligence was the sole proximate cause of the injury, the court ruled that the claims were covered and thus USF&G had a duty to defend (USF&G I) and to indemnify (USF&G II).

USF&G must be read together with *Allstate Insurance Co. v. Pruitt*, 177 Ill. App. 3d 407, 532 N.E.2d 401 (1st Dist. 1988), which limits the applicability of the USF&G principles to cases in which the two causes of injury are wholly independent of one another. Relying on *USF&G I*, the Pruitts argued that "the separate and distinct allegation of failure to supervise may be covered even in a case in which negligent operation is also alleged and excluded." 532 N.E.2d at 430. The Illinois Appellate Court distinguished *USF&G I* as a case in which "the underlying

complaint described acts of alleged negligence and theories of recovery wholly independent from those relating to the allegedly negligent operation of the automobile." *Id.*; *see also State Farm Fire & Cas. Co. v. Mann*, 172 Ill. App. 3d 86, 88, 526 N.E.2d 389, 393 (1st Dist. 1988) ("the [USF&G] court limited its holding to cases where the actionable event could be proved independent of the excluded motor vehicle").

In the case at bar we are faced, as in *Allstate*, with two events which are virtually indistinguishable from each other and cannot be argued to be wholly independent from each other. The Board has simply attempted to relabel the ACM with the name dangerous product. Thus, the reasoning behind the concurrent or multiple proximate causation doctrine is inapplicable.

AFM'S DEDUCTIBLE SHOULD BE APPLIED ON A PER SCHOOL BASIS

The Board's final argument is that even if it is determined that some of the asbestos release was caused by events or perils to which the policy could respond, the damage caused by each such covered peril constitutes an occurrence below the policy deductible. AFM claims that the Board in its Answers to Interrogatories, concluded that the dangers allegedly suffered resulted from many events and occurrences. AFM also points out that the Board admitted in its state court action that events and occurrences that resulted in or gave rise to the release of dangerous, respirable asbestos fibers included the tortious conduct of "manufacturers and vendors, . . . water damage, vibration . . . and wind."[33] In light of these admissions, AFM claims that every event or occurrence listed as a cause of loss, commencing with the installation, must be construed as a separate occurrence. Moreover, each separate occurrence of water, damage, vibration, wind or other facts falls below the deductible.

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[33] AFM's Exhibit I.

The Board, on the other hand, argues that the Board has suffered "one continuing" loss occurrence which exceeds even the highest policy deductible of one million dollars at each of more than 100 buildings. The Board presses an analysis that because each school has sustained a single continuous loss, there is only one occurrence per school for deductible purposes. AFM's contention that calculation of the number of occurrences turns on the number of times that asbestos fibers are released can be quickly disposed of.

Illinois has addressed this issue and I agree with the Board that loss occurrence in this case should be determined by the cause of the injury and thus the deductible should be applied on a school by school basis. The general rule is that an occurrence is determined by the cause of the resulting injury. *Appalachian Ins. Co. v. Liberty Mutual Ins. Co.*, 676 F.2d 56, 61 (3d Cir. 1982). Illinois follows this rule. *Mason v. Home Ins. Co. of Illinois*, 177 Ill. App. 3d 454, 460, 532 N.E.2d 526, 529 (3d Dist. 1988). Furthermore, turning to the language in the insurance policies, the parties' selection of "Loss occurrence shall mean all losses arising out of one event" indicates that the liability policy was not intended to gauge coverage on the basis of the release of individual asbestos fibers, but rather on the underlying circumstances which resulted in the claims for damages. *Champion Int'l Corp. v. Continental Casualty Co.*, 546 F.2d 502, 506 (2d Cir. 1976), *cert. denied*, 434 U.S. 819, 98 S.Ct. 59 (1977). *See also Newmont Mines, Ltd. v. Hanover Ins. Co.*, 784 F.2d 127, 135 (2d Cir. 1986) (In construing the term occurrence as used in liability insurance policies courts generally have concluded "the number of occurrences for purposes of applying coverage limitations is determined by references to the cause or causes of the damage and not the number of injuries or claims") (*quoting Michigan Chemical Corp. v. American Home Assurance Co.*, 728 F.2d 374, 379 (6th Cir. 1984)); *Owens Illinois, Inc. v. Aetna Casualty & Surety Co.*, 597 F. Supp. 1515, 1525 (D.D.C. 1984) (reviewing policy language and

concluding that "the number of injuries or claims even if temporarily removed from these causes, are irrelevant when determining the number of occurrences"); *Transport Ins. Co. v. Lee Way Monroe Freight, Inc.*, 487 F. Supp. 1325, 1330 (N.D. Tex. 1980). Thus, rather than looking to the claims, a court should look to the underlying event.

The parties offer little by way of extrinsic evidence with regard to the meaning they attach to the concept of occurrence. Because I find that the occurrence definition is straightforward, the interpretation of the policy language is left to this court under Illinois law. *Mason v. Home Insurance Co. of Illinois*, 177 Ill. App. 3d 454, 460, 532 N.E.2d 526, 529 (3d Dist. 1988) (*citing United States Fire Ins. Co. v. Schnackenberg*, 88 Ill. 2d 1, 5, 429 N.E.2d 1203 (1981)). Even if it was concluded that this language was ambiguous, the result would be the same. This is because under Illinois law a court must resolve an ambiguity in a manner which favors the insured and permits recovery. *Schnackenberg*, 88 Ill. 2d at 4, 429 N.E.2d 1203 (1981). Applying these presumptions, while also keeping in mind the business purposes sought to be achieved by the parties and the plain meaning of the words chosen I recommend that the occurrence was the installation of the asbestos in each of the Board's individual school buildings. As such, the deductible should be applied on a school by school basis. This conclusion is in accord with the conclusion reached in *Owens-Illinois, Inc. v. Aetna Casualty & Surety Co.*, 597 F. Supp. 1515 (D.D.C. 1984), and *Household Manufacturing, Inc. v. Liberty Mutual Ins. Co.*, 1987 WL 6611 (N.D. Ill. 1987), Gen. Fed. Library.

In *Owens-Illinois*, a manufacturer of asbestos containing products sought a declaratory judgment on the issue of its insurer's obligation to indemnify. Upon reaching the "occurrence" issue, the court rejected the insurer's argument that each personal injury claim constituted a separate occurrence, and concluded that the manufacture and sale was "the single occurrence." As such, the

insured's coverage was held to be subject to a single deductible. *Owens-Illinois*, 597 F. Supp. 1528.

This determination is also consistent with the conclusions reached in various non-asbestos cases. In *Uniroyal*, 707 F. Supp. 1368, 1377 (E.D.N.Y. 1988), a case which involved determination of insurers' liability to the manufacturer of Agent Orange, Judge Weinstein concluded that the delivery of Agent Orange to the Government, rather than the manufacture, actual spraying or individual exposures, constituted a "single continuous occurrence" for coverage purposes. Similarly, *Household Manufacturing, Inc. v. Liberty Mutual Ins. Co.*, 1987 WL 6611 (N.D. Ill. 1987), involved multiple separate deliveries of defective plumbing units. Because all of the plumbing units were defective, the court concluded that the numerous shipments on a mass basis were a unitary, continuous and repeated exposure to the same contaminations and thus one occurrence. The court states "[w]here the extent of injury from any or each of several purportedly discrete causes cannot be ascertained, a determination that multiple occurrences exist so as to insulate the insurer from liability beyond the per occurrence limit cannot be justified." *Id.*

To measure losses as AFM argues--by each time the building was exposed to wind or water or by each time a ball hit the ceiling, or each student scratched his initials in the wall--would be inappropriate. It is now known that the release of fibers from ACM is continuous and inevitable, whether or not discrete events intervene. Further, once released, asbestos fibers remain in the air for long periods of time and, upon disturbances move to other areas of the building. Thus, to determine the loss from each single incident of fiber release in a building would be akin to attempting to measure the loss from each flame of a fire. The losses here are neither separate nor distinct within a building and constitute a single loss occurrence. Since each school has sustained a single, continuing loss, I am recommending that the district court conclude that there is only one occurrence per school for deductible purposes.

CONCLUSION

For the foregoing reasons it is recommended that AFM's motion for summary judgment be **DENIED** and the Board's 56(f) motion **GRANTED**.

Respectfully submitted,

RONALD A. GUZMÁN
United States Magistrate Judge

DATE: OCTOBER 5, 1992

Any objections to this Report and Recommendation must be filed with the Clerk of the Court within ten (10) days of receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order. *See* Fed.R.Civ.P. 72(b); 28 U.S.C. § 636(b)(1). *Egert v. Connecticut Gen. Life Ins. Co.*, 900 F.2d 1032, 1039 (7th Cir. 1990).

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

June 7, 1994

Before

Hon. THOMAS E. FAIRCHILD, Circuit Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge

AFFILIATED FM INSURANCE COMPANY,	)
	) Appeal from the United
	) States District Court
Plaintiff-Appellee,	) for the Northern
	) District of Illinois,
No. 93-2786 vs.	) Eastern Division.
	)
BOARD OF EDUCATION OF THE CITY OF CHICAGO,	) No. 90 C 6040
	)
	) George W. Lindberg,
Defendant-Appellant.	) *Judge*.

ORDER

On consideration of the petition for rehearing filed by defendant-appellant on May 26, 1994, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.